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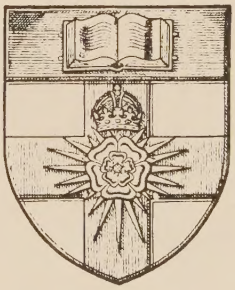

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97	9	she	the trustees
	10	a person with life tenant powers	trustees for sale
170	8 from bottom	cannot to my mind mean persons	connote to my mind persons
281	Footnote (4)	15 App. Cas.	[1915] A. C.
610	5	respondent	applicant
652	Footnote (1)	52 Times L. R.	25 Times L. R.

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A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Achillopoulos, In re. Johnson *v.* Mavromichali – – – 433
Aldridge, Public Trustee *v.* In re King – – – – 350
Anderson-Berry, In re. Harris *v.* Griffith – – (C. A.) 290
Ashwell and Nesbit, Catton *v.* (C. A.) 484
Aspinall, Public Trustee *v.* In re Smith – – – – 915
Assurance (National Benefit) Co., In re. Ex parte English Insurance Co. – (C. A.) 74
Assurance (Royal Exchange) *v.* Hope – – (C. A.) 179
Atlantic and Pacific Fibre Importing and Manufacturing Co., In re. Viscount Burnham *v.* The Company – – 836
Audenshaw Urban Council, Manchester Corporation *v.* – 127
——————— *v.* (C. A.) 763

B.

PAGE

Bancroft, In re. Bancroft *v.* Bancroft – – – – 577
——— *v.* Bancroft. In re Bancroft – – – – 577
Barrett, Royal London Mutual Insurance Society *v.* – – 411
Barton *v.* Keeble – – – 517
Bates, In re. Mountain *v.* Bates – – – – 682
——— Mountain *v.* In re Bates 682
Bishop, Way *v.* – (C. A.) 647
Blackwell, In re. Blackwell *v.* Blackwell – – (C. A.) 614
——— *v.* Blackwell. In re Blackwell – – (C. A.) 614
Bonham-Carter, First Garden City *v.* – – – – 53
Boulton, Stewart *v.* In re Boulton's Settlement Trust – 703
Boulton's Settlement Trust, In re. Stewart *v.* Boulton – 703
Bowen *v.* Davidson. In re Stokes – – – – 716

PAGE
Bradford City Premises, In re – 138
Bridgett and Hayes' Contract, In re – – – – – 163
Brooks, In re. Public Trustee v. White – – (C. A.) 214
Burnham (Viscount) v. Atlantic and Pacific Fibre Importing and Manufacturing Co. In re The Company – – – 836

C.

Caerphilly Urban Council v. Griffin – – – – 171
Calder's Yeast Co. v. Stockdale (C. A.) 340
Calow, In re. Calow v. Calow – 710
——— v. Calow. In re Calow – 710
Catchpool, In re. Harris v. Catchpool – – – – 429
———, Harris v. In re Catchpool – – – – 429
Catton v. Ashwell and Nesbit (C. A.) 484
Chaplin, Ex parte. In re Harrington Motor Co. (C. A.) 105
Chardon, In re. Johnston v. Davies – – – – 464
Clarke, Johnson v. – – – 847
Collaroy Co. v. Giffard – – 144
Cone, Gardner & Co. v. – – 955
Coward, Chance & Co., In re – 379
Cranbux, Ld., In re – – 829
Crediton Gas Co. v. Crediton Urban Council – – – 174
——— v. ——— (C. A.) 447
Crediton Urban Council, Crediton Gas Co. v. – – 174
——— v. (C. A.) 447

D.

Davidson, Bowen v. In re Stokes – – – – 716
Davies, In re. Thomas v. Thomas-Davies – – – 24
———, Johnston v. In re Chardon – – – – 464
PAGE
Davies v. Ripon Corporation – 884
Dawson's Settled Estates, In re 421
Debtor, In re A – (C. A.) 199
——— Ex parte Lawrence – – – – – 665
De la Garde v. Worsnop & Co.– 17
Derwent, Grant v. – – – 902
Draycott Settled Estate, In re – 371
Drukker, Queen of Holland v. In re Visser – – – 877
Ducker's Trade Mark, In re – 405

E.

E. A., In re – – (C. A.) 528
Eastwood, Hanson v. In re Hanson – – – – 96
English Insurance Co., Ex parte. In re National Benefit Assurance Co. – – (C. A.) 74
Etic, Ld., In re – – – 861

F.

Fegan, In re. Fegan v. Fegan – 45
——— v. Fegan. In re Fegan – 45
Finucane, Paddington Borough Council v. – – – – 567
First Garden City v. Bonham-Carter – – – – 53
First Russian Insurance Co. v. London and Lancashire Insurance Co.– – – – 922
Franklin v. Smith. In re Smith 10
Fraser, In re – – (C. A.) 528
Freedman, Palmolive Co. (of England) v. – (C. A.) 264

G.

Gardner & Co. v. Cone – – – 955
Gas (Crediton) Co. v. Crediton Urban Council – – – 174
——— v. ——— (C. A.) 447
Gaul and Houlston's Contract, In re – – – (C. A.) 689

PAGE

Giffard, Collaroy Co. *v.* – – 144
Gillam, Holland *v.* In re Robins 721
Graham *v.* Marshall. In re Marshall – – – – 661
Graigola Merthyr Co. *v.* Swansea Corporation – – – 31
——— *v.* ———
——— – (C. A.) 235
Grant *v.* Derwent – – – 902
——— *v.* Knaresborough Urban Council – – – – 310
Gray, Sunderland Corporation *v.* – – – – – 756
Greene, In re – – (C. A.) 528
Griffin, Caerphilly Urban Council *v.* – – – – 171
Griffith, Harris *v.* In re Anderson-Berry – – (C. A.) 290

H.

Hanson, In re. Hanson *v.* Eastwood – – – – – 96
——— *v.* Eastwood. In re Hanson – – – – 96
Harrington Motor Co., In re. Ex parte Chaplin (C. A.) 105
Harris *v.* Catchpool. In re Catchpool – – – – 429
——— *v.* Griffith. In re Anderson-Berry – – (C. A.) 290
Harwood, Tredegar (Lord) *v.* – (C. A.) 59
Hauser and Spencer's Contract, In re – – – – – 598
Hayes' and Bridgett's Contract, In re – – – – – 163
Hayward, In re. Merson *v.* Hayward – – – – 367
———, Merson *v.* In re Hayward – – – – – 367
Holland *v.* Gillam. In re Robins 721
Hood's Trustees *v.* Southern Union General Insurance Co. of Australasia – (C. A.) 793
Hope *v.* Royal Exchange Assurance – – – (C. A.) 179
Hoskyns-Abrahall *v.* Paignton Urban Council – – – 671

PAGE

Houlston and Gaul's Contract, In re – – – (C. A.) 689
Howden and Hyslop's Contract, In re – – – – – 479
Hull *v.* Myhill. In re Myhill – 100
Hyslop and Howden's Contract, In re – – – – – 479

I.

Insurance (English), Ex parte. In re National Benefit Assurance Co. – – (C. A.) 74
——— (First Russian) Co. *v.* London and Lancashire Insurance Co.– – – – 922
——— (London and Lancashire) Co., First Russian Insurance Co. *v.* – – – 922
——— (Royal London Mutual) Society *v.* Barrett – 411

J.

Johns, In re. Worrell *v.* Johns 737
——— Worrell *v.* In re Johns – 737
Johnson *v.* Clarke – – – 847
——— *v.* Mavromichali. In re Achillopoulos – – – 433
Johnston *v.* Davies. In re Chardon – – – – 464

K.

Keeble, Barton *v.* – – – 517
Kimber, In re. Vale *v.* Rockman – – – – – 749
King, In re. Public Trustee *v.* Aldridge – – – – 330
Knaresborough Urban Council, Grant *v.* – – – – 310

L.

La Radiotechnique *v.* Weinbaum – – – – 1

PAGE

Lawrence, Ex parte. In re A Debtor – – – – 665
London and Lancashire Insurance Co., First Russian Insurance Co. *v.* – – – 922

M.

Maber, In re. Ward *v.* Maber – 88
——— Ward *v.* In re Maber – 88
Manchester Corporation *v.* Audenshaw Urban Council – 127
——————————— *v.* ——————————— (C. A.) 763
Marshall, In re. Graham *v.* Marshall – – – – 661
———, Graham *v.* In re Marshall – – – – 661
Mason, In re – – – – 385
Mavromichali, Johnson *v.* In re Achillopoulos – – – 433
Merson *v.* Hayward. In re Hayward – – – – 367
Motor (Harrington) Co., In re. Ex parte Chaplin (C. A.) 105
Mountain *v.* Bates. In re Bates 682
Myhill, In re. Hull *v.* Myhill – 100
———, Hull *v.* In re Myhill – 100

N.

National Benefit Assurance Co., In re. Ex parte English Insurance Co. – (C. A.) 74
Nelson, In re. Norris *v.* Nelson (C. A.) 920n.
———, Norris *v.* In re Nelson (C. A.) 920n.
Norris *v.* Nelson. In re Nelson (C. A.) 920n.

P.

Paddington Borough Council *v.* Finucane – – – – 567
Paignton Urban Council, Hoskyns-Abrahall *v.* – – 671
Palmolive Co. (of England) *v.* Freedman – – (C. A.) 264

PAGE

Parker *v.* Parker. In re Parker's Settled Estates – – – 247
Parker's Settled Estates, In re. Parker *v.* Parker – – 247
Pawson, Reeves *v.* In re Reeves 351
Price, In re – – – – 579
Public Trustee *v.* Aldridge. In re King – – – – 330
——————— *v.* Aspinall. In re Smith – – – – 915
——————— *v.* Villar. In re Villar – – – – 471
——————— *v.* White. In re Brooks – – (C. A.) 214

Q.

Queen of Holland *v.* Drukker. In re Visser – – – 877

R.

Reeves, In re. Reeves *v.* Pawson – – – – 351
——— *v.* Pawson. In re Reeves 351
Reigate Corporation *v.* Surrey County Council – – – 359
Ripon Corporation, Davies *v.* – 884
Robins, In re. Holland *v.* Gillam – – – – 721
Rockman, Vale *v.* In re Kimber 749
Royal Exchange Assurance *v.* Hope – – (C. A.) 179
Royal London Mutual Insurance Society *v.* Barrett – – 411

S.

Schnapper, In re – – – 420
Sladen, Tattersall *v.* – – 318
Smith, In re. Franklin *v.* Smith – – – – 10
———, In re. Public Trustee *v.* Aspinall – – – – 915
———, Franklin *v.* In re Smith 10
Southern Union General Insurance Co. of Australasia, Hood's Trustees *v.* (C. A.) 793

PAGE

Spencer and Hauser's Contract, In re – – – – – 598
Steam Coal (Windsor) Co. (1901), In re – – – – – 609
Stewart *v.* Boulton. In re Boulton's Settlement Trust – 703
Stockdale, Calder's Yeast Co. *v.* – – – (C. A.) 340
Stokes, In re. Bowen *v.* Davidson – – – – 716
Sunderland Corporation *v.* Gray 756
Surrey County Council, Reigate Corporation *v.* – – – 359
Swansea Corporation, Graigola Merthyr Co. *v.* – – – 31
———————— *v.* (C. A.) 235

T.

Tattersall *v.* Sladen – – – 318
Thomas *v.* Thomas-Davies. In re Davies – – – – 24
Thomas-Davies, Thomas *v.* In re Davies – – – – 24
Tredegar (Lord) *v.* Harwood (C. A.) 59

V.

Vale *v.* Rockman. In re Kimber 749
Villar, In re. Public Trustee *v.* Villar – – – – 471
Villar, Public Trustee *v.* In re Villar – – – – 471
Visser, In re. Queen of Holland *v.* Drukker – – – – 877

W.

Ward *v.* Maber. In re Maber – 88
Warren, Wheeler (M.) & Co. *v.*– 840
Way *v.* Bishop – (C. A.) 647
Weinbaum, La Radiotechnique *v.* – – – – – 1
Wheater, In re – (C. A.) 223
Wheeler (M.) & Co. *v.* Warren – 840
White, Public Trustee *v.* In re Brooks – – (C. A.) 214
Whitworth, In re – (C. A.) 528
Wilts and Somerset Farmers, In re – – – – – 809
Windsor Steam Coal Co. (1901), In re – – – – – 609
Wood, In re – – (C. A.) 528
Worrell *v.* Johns. In re Johns – 737
Worsnop & Co., De la Garde *v.*– 17

Y.

Yeast (Calder's) Co. *v.* Stockdale – – – (C. A.) 340

TABLE OF CASES CITED.

A.

		PAGE
Abbot and Convent of Wardon's Case.	Ryley's Pleadings in Parliament (1305), 262	388
Abrahams, In re	[1911] 1 Ch. 108	719
Agricultural Wholesale Society *v.* Biddulph and District Agricultural Society	[1925] Ch. 769	817
Alexander *v.* Mills	L. R. 6 Ch. 124	855
Alger *v.* Parrott	L. R. 3 Eq. 328	216
Alington (Lord) and London County Council's Contract, In re	[1927] 2 Ch. 253	375
Allen *v.* Fulham Vestry	[1899] 1 Q. B. 681	890
Allnutt, In re	22 Ch. D. 275	13
Alves *v.* Hodgson	7 T. R. 241	880
Andrew, In re	1 Ch. D. 358	667
——— *v.* Bridgman	[1907] 2 K. B. 494; [1908] 1 K. B. 596	963
Anglo-Baltic and Mediterranean Bank *v.* Barber & Co.	[1924] 2 K. B. 410	107
Anglo-French Music Company *v.* Nicoll	[1921] 1 Ch. 386	144
Anglo-Moravian Hungarian Junction Railway Company, In re	1 Ch. D. 130	612
Antrobus *v.* Davidson	3 Mer. 569	297
Aquascutum, Ld. *v.* Moore and Scantlebury	20 R. P. C. 640	4
Aramayo Francke Mines *v.* Eccott	[1925] A. C. 634	77
Archer's Case	[1892] 1 Ch. 322	869
Armstrong *v.* London County Council	[1900] 1 Q. B. 416	890
Arthur Average Association for British, Foreign and Colonial Ships, In re. Ex parte Hargrove & Co.	L. R. 10 Ch. 542	77
Ascherson *v.* Tredegar Dry Dock and Wharf Company	[1909] 2 Ch. 401	294
Ashby *v.* Harris	L. R. 3 C. P. 523	673
Astrup, Ex parte	11 Ch. D. 303	665
Atkinson, In re	9 Mor. 193	203
Atkinson and Horsell's Contract, In re	[1912] 2 Ch. 1	601
Attorney-General *v.* Forsikringsaktieselskabet National (of Copenhagen)	[1924] 1 K. B. 366; 40 Times L. R. 639	77, 86
——— *v.* Great Northern Railway Company	[1916] 2 A. C. 356	130, 763
——— *v.* Köhler	9 H. L. C. 654	385
——— *v.* Laird	[1925] Ch. 318	890
——— *v.* Manchester Corporation	[1893] 2 Ch. 87	242
——— *v.* Staffordshire County Council	[1905] 1 Ch. 336	362
Attorney-General for Canada *v.* Schulze	9 Sc. L. T. 4	879
Attorney-General for Ireland *v.* Lagan Navigation Company	[1924] A. C. 877	130, 763

		PAGE
Attorney-General of the Commonwealth of Australia *v.* Adelaide Steamship Company	[1913] A. C. 781	267
Atwell *v.* Atwell	L. R. 13 Eq. 23	377
Aylesford (Lord) *v.* Poulett (Earl)	[1891] 1 Ch. 248	381

B.

Baker, In re	[1912] 2 Ch. 405	381
—— *v.* Courage & Co.	[1910] 1 K. B. 56	390
Baker and Selmon's Contract, In re	[1907] 1 Ch. 238	598
Bank Line *v.* Arthur Capel & Co.	[1919] A. C. 435	931
Bateman (Lady) *v.* Faber	[1898] 1 Ch. 144	251
Batt's Trade Marks, In re	[1898] 2 Ch. 432; [1899] A. C. 428	405, 407
Bebro, In re	[1900] 2 Q. B. 316	203
Bellerby *v.* Heyworth	[1910] A. C. 377	320
Bengough *v.* Edridge	Unreported	478
Bennett, In re	[1913] 2 Ch. 318	223
Berton *v.* Alliance Economic Investment Company	[1922] 1 K. B 742	521
—— *v.* London and Counties House Property Investment and Realization Company	Unreported	521
Biddulph and District Agricultural Society *v.* Agricultural Wholesale Society	[1925] Ch. 769; [1927] A. C. 76	810
Birch, In re	[1909] 1 Ch. 787	45
—— *v.* Cropper	39 Ch. D. 1; 14 App. Cas. 525	144, 147
Bird, In re	[1927] 1 Ch. 210	690
Bird's Trusts, In re	3 Ch. D. 214	690
Birks, In re	[1900] 1 Ch. 417	216
Birmingham Corporation *v.* Baker	17 Ch. D. 782	569
Blagrave *v.* Blagrave	4 Ex. 550	424
Boake, Roberts & Co. *v.* Wayland & Co.	26 R. P. C. 249	4
Borough Commercial and Building Society, In re	[1893] 2 Ch. 242	813
Bouch *v.* Sproule	12 App. Cas. 385	682
Boucher *v.* Lawson	Cases temp. Hard. 85	881
Bournemouth Commissioners *v.* Watts	14 Q. B. D. 87	455
Bradford *v.* Gammon	[1925] Ch. 132	295
Bradley and Essex and Suffolk Accident Indemnity Society, In re	[1912] 1 K. B. 415	801
Braunstein *v.* Accidental Death Insurance Company	1 B. & S. 782	63
Brett *v.* Beckwith	26 L. J. (Ch.) 130	78
Bridge *v.* Abbot	3 Bro. C. C. 224	214
Bridgewater Navigation Company, In re	39 Ch. D. 1; 14 App. Cas. 525	149
Bristol Union and National Insurance Company *v.* Rawson	[1911] 2 K. B. 705	107
Bristow *v.* Sequeville	5 Ex. 275	880
British and Beningtons, Ld. *v.* N. W. Cachar Tea Company	[1923] A. C. 48	188
Brooks, Jenkins & Co. *v.* Torquay Corporation	[1902] 1 K. B. 601	452

		PAGE
Brooksbank *v.* Smith	2 Y. & C. Ex. 58	389
Brown's Trust, In re	L. R. 1 Eq. 74	706
Bryant and Barningham's Contract, In re	44 Ch. D. 218	602
Bullock, In re	64 L. T. 736	917
Burger *v.* New York Life Assurance Company	43 Times L. R. 601	932
Burgess' Policy, In re	113 L. T. 443	181
Burton & Co. *v.* English & Co.	12 Q. B. D. 218	63

C.

Cadell *v.* Palmer	1 Cl. & F. 372	478
Canterbury (Viscount) *v.* Attorney-General	1 Ph. 306	388
Carey *v.* Metropolitan Borough of Bermondsey	67 J. P. 447	237
Carne *v.* Long	2 D. F. & J. 75	465
Carr *v.* Roberts	5 B. & Ad. 78	115, 803
Cassel, In re	[1926] Ch. 358	465, 707
Cavendish Bentinck *v.* Fenn	12 App. Cas. 652	873
Chambers *v.* Bicknell	2 Hare, 536	438
Champion, In re	[1893] 1 Ch. 101	353
Chapman, In re	[1904] 1 Ch. 431	14
City Bank *v.* Sovereign Life Assurance Company	50 L. T. 565	413
City Equitable Fire Insurance Company, In re	[1925] Ch. 407	610
Cleaver *v.* Mutual Reserve Fund Life Association	[1892] 1 Q. B. 147	181
Clegg *v.* Levy	3 Camp. 166	880
Cliff Contract, In re	[1927] 2 Ch. 94	367
Clifford, In re	[1912] 1 Ch. 29	578
Cocks *v.* Manners	L. R. 12 Eq. 574	465
Cohen, In re	60 Sol. J. 239	663
——— *v.* Gold	[1927] 1 K. B. 865	522
Coleman, In re	39 Ch. D. 443	917
Colyer's Farningham Estate, In re	[1927] 1 Ch. 677	424, 727
Corbyn *v.* French	4 Ves. 418	216
Cosh's Contract, In re	[1897] 1 Ch. 9	963
Cotton *v.* Cotton	2 Beav. 67	214
——— *v.* The King	[1914] A. C. 179	880
Coventry and Dixon's Case	14 Ch. D. 660	868
Coverdale *v.* Charlton	4 Q. B. D. 104	362, 908
Crawford's Trusts, In re	2 Drew. 230	214
Crawshay, In re	[1891] 3 Ch. 176	113
Crow, In re	Unreported	203
Crowder *v.* Tinkler	19 Ves. 617	242
Cunninghame's Settlement, In re	L. R. 11 Eq. 324	706

D.

Dale *v.* Lolley	2 Bro. C. C. 582n.	294
Dann *v.* Spurrier	3 Bos. & P. 399	63

		PAGE
Darlington *v.* Darlington	[1926] W. N. 192	369
Davies *v.* Glyncorrwg Colliery Company	[1925] 2 K. B. 339	505
Dawson's Settled Estates, In re	[1928] Ch. 421	728
Debtor, In re A	[1908] 2 K. B. 684	668
———	[1927] 1 Ch. 410	869
De la Viesca *v.* Lubbock	10 Sim. 629	438
Dewell, In re	4 Drew. 269	441
Deyes *v.* Wood	[1911] 1 K. B. 806	842
Dibble *v.* Wilts and Somerset Farmers	[1923] 1 Ch. 342	810
Di Sora *v.* Phillips	10 H. L. C. 624	932
Dobbs *v.* Brain	[1892] 2 Q. B. 207	294
Doe *v.* Marchant	6 Man. & G. 813	24
Donald H. Scott & Co. *v.* Barclays Bank	[1923] 2 K. B. 1	63
Donohoe *v.* Donohoe	19 L. R. Ir. 349	420
Drant *v.* Vause	1 Y. & C. Ch. 580	710
Duchy of Lancaster Case	1 Plowd. 212	388
Dudley Corporation, In re	8 Q. B. D. 86	908
Dunlop Pneumatic Tyre Company *v.* New Garage and Motor Company	[1915] A. C. 79	267
——— *v.* Selfridge & Co.	[1913] W. N. 46; 29 Times L. R. 270; [1915] A. C. 79; [1915] A. C. 847	266, 267, 281
Dunn *v.* Birmingham Canal Navigation Company	L. R. 7 Q. B. 244; L. R. 8 Q. B. 42	34
——— *v.* Green	3 P. Wms. 8	593
Dutton, In re	4 Ex. D. 54	465
Dyson *v.* Attorney-General	[1912] 1 Ch. 158	310

E.

E. G., In re	[1914] 1 Ch. 927	226
Eames *v.* Hacon	16 Ch. D. 407; 18 Ch. D. 347	438
Eastern Carrying Insurance Company *v.* National Benefit Life and Property Assurance Company	35 Times L. R. 292	931
Edwards, Ex parte	13 Q. B. D. 747	208
——— *v.* Dennis	30 Ch. D. 454	407
Ellenborough, In re	[1903] 1 Ch. 697	181
Elliman, Sons & Co. *v.* Carrington & Son	[1901] 2 Ch. 275	266
Elliston *v.* Reacher	[1908] 2 Ch. 374	906
Emperor of Austria *v.* Day	3 D. F. & J. 217	880
Employers' Liability Assurance Corporation *v.* Sedgwick, Collins & Co.	[1927] A. C. 95	929
Empress Assurance Corporation *v.* Bowing & Co.	11 Com. Cas. 107	78
Emuss *v.* Smith	2 De G. & Sm. 722	712
Engelbach's Estate, In re	[1924] 2 Ch. 348	181
Espuela Land and Cattle Company, In re	[1909] 2 Ch. 187	144
Eva (The)	[1921] P. 454	881
Evans (Joseph) & Co. *v.* Heathcote	[1918] 1 K. B. 418	267
Eyre-Williams, In re	[1923] 2 Ch. 533	390

F.

		PAGE
Fielden *v.* Morley Corporation	[1899] 1 Ch. 1; [1900] A. C. 133	237
——— *v.* ———	[1899] 1 Ch. 1	39
Fisher *v.* Prowse	31 L. J. (Q. B.) 212	362
Fleetwood, In re	15 Ch. D. 594	614
Fletcher *v.* Birkenhead Corporation	[1906] 1 K. B. 605; [1907] 1 K. B. 205	34, 36
——— *v.* Fletcher	4 Hare, 67	182
Flint, In re	[1927] 1 Ch. 570	424, 725
Flitcroft's Case	21 Ch. D. 519	867
Forsikringsaktieselskabet National (of Copenhagen) *v.* Attorney-General	[1925] A. C. 639	937
Foundling Hospital *v.* Lewis	Times Newsp., August 8, 1904	63
Frances *v.* Ley	Cro. Jac. 366	673
Fraser, In re	[1904] 1 Ch. 726	353
Fraser and Chalmers, In re	[1919] 2 Ch. 114	144
Freeborn *v.* Leeming	[1926] 1 K. B. 160	237
Freeman, In re	[1927] 1 Ch. 479	536
Frewen, In re	[1926] Ch. 580	727
——— *v.* Frewen	L. R. 10 Ch. 610	590

G.

G., In re	44 Sol. J. 345	203
Gage, In re	[1898] 1 Ch. 498	464
Gandy *v.* Gandy	30 Ch. D. 57	182
Gardner, In re	[1920] 2 Ch. 523	618
——— *v.* Lucas	3 App. Cas. 582	963
Gardom, In re	[1914] 1 Ch. 662	619
Gibson & Co. *v.* Wishart	[1915] A. C. 18; 7 B. W. C. C. 348	502, 508
Gilfoyle *v.* Wood-Martin	[1921] 1 I. R. 105	712
Glasgow Assurance Corporation *v.* Williamson Symondson & Co.	16 Com. Cas. 109	78
Godson's Claim	[1915] 1 Ch. 340	107
Goldberg, In re	21 Times L. R. 139	203
Goodall's Settlement, In re	[1909] 1 Ch. 440	251
Graham *v.* Campbell	7 Ch. D. 490	488
Grand Junction Waterworks Company *v.* Hampton Urban Council	[1898] 2 Ch. 331; 63 J. P. 503; 15 Times L. R. 412	31, 40, 235, 241
Gray, In re	[1927] 1 Ch. 242	722
Green *v.* Spicer	1 Russ. & My. 395	917
Gregory *v.* Williams	3 Mer. 582	182
Grey *v.* Tolme	31 Times L. R. 137	20
Griffiths *v.* Vere	9 Ves. 127; Tudor's Real Property Cases, 4th ed., 618	90
Grimond *v.* Grimond	[1905] A. C. 124	619
Gully *v.* Smith	12 Q. B. D. 121	362
Gurnall *v.* Wood	Willes, 211	476

H.

Hailes and Hutchinson's Contract, In re	[1920] 1 Ch. 233	602
Hall *v.* Rogers	41 Times L. R. 341	522

		PAGE
Hancock *v.* Watson	[1920] A. C. 14	661
Handsworth District Council *v.* Derrington	[1897] 2 Ch. 438	756
Hardyman, In re	[1925] Ch. 287	353
Harnett *v.* Yielding	2 Sch. & Lef. 549	851
Harrington Motor Company, In re	44 Times L. R. 58; [1928] Ch. 105	793
Harris *v.* Harris (No. 2)	29 Beav. 110	394
Harrop *v.* Ossett (Mayor)	[1898] 1 Ch. 525	31, 235
Hayman, In re	Not reported	663
Head's Trustees and Macdonald, In re	45 Ch. D. 310	602
Hellman's Will, In re	L. R. 2 Eq. 363	420
Henry *v.* Sargeant	13 New Hamp. Reps. (U.S.A.) 321	880
Herbert Morris, Ld. *v.* Saxelby	[1915] 2 Ch. 57; [1916] 1 A. C. 688	267, 273
Hertfordshire County Council *v.* Great Eastern Railway Company	[1909] 2 K. B. 403	362
Hetley, In re	[1902] 2 Ch. 866	618
Hewson *v.* Shelley	[1914] 2 Ch. 13	166
Hibbert *v.* Martin	1 Camp. 538	799
Higgs' and May's Contract, In re	[1927] 2 Ch. 249	102, 424, 722
Hill *v.* Patten	8 East, 373	186
Hirji Mulji *v.* Cheong Yue Steamship Company	[1926] A. C. 497	20, 931
Hitchcock *v.* Way	6 Ad. & E. 943	963
Holford, In re	[1894] 3 Ch. 30	88, 333
——— *v.* Acton Urban Council	[1898] 2 Ch. 240	31, 237
Holliday and Wakefield Corporation's Arbitration	20 Q. B. D. 699; [1891] A. C. 81	37
Holman *v.* Johnson	1 Cowp. 341	880
Home Marine Insurance Company *v.* Smith	[1898] 1 Q. B. 829; [1898] 2 Q. B. 351	74
Hood *v.* Barrington (Lord)	L. R. 6 Eq. 218	479
Horlock *v.* Beal	[1916] 1 A. C. 511	931
Hosegood & Sons *v.* Wilson	[1911] 1 K. B. 30	503
Hotchkys, In re	32 Ch. D. 408	722
Houlder Bros. & Co. *v.* Gibbs	[1925] Ch. 198, 575	63
Houston *v.* Burns	[1918] A. C. 337	619
Howes, In re	[1892] 2 Q. B. 628	668
Hughes-Hallett *v.* Indian Mammoth Gold Mines Company	22 Ch. D. 561	294
Hulton & Co. *v.* Chadwick	34 Times L. R. 230	932
Humberston *v.* Humberston	1 P. Wms. 332	476
Huntington *v.* Attrill	[1893] A. C. 150	879
Huxtable, In re	[1902] 1 Ch. 214; [1902] 2 Ch. 793	614, 638

I.

Ibbetson, Ex parte	8 Ch. D. 519	799
Indian and General Investment Trust *v.* Borax Consolidated	[1920] 1 K. B. 539	879
Inland Revenue Commissioners *v.* Muller & Co.'s Margarine	[1901] A. C. 217	831
Innes & Co., In re	[1903] 2 Ch. 254	869
Irish Provident Assurance Company, In re	[1913] 1 I. R. 352	869

J.

		PAGE
James, Ex parte	L. R. 9 Ch. 609	107
—— In re	62 L. J. Newsp. 475	166
—— *v.* Catherwood	3 Dow. & Ry. 190	881
Jary *v.* Barnsley Corporation	[1907] 2 Ch. 600	908
Jeffery, In re	[1891] 1 Ch. 671; [1895] 2 Ch. 577	333, 335
Jeremiah Ambler & Son, Ld. *v.* Bradford Corporation	[1902] 2 Ch. 585	39
Johnson, In re	29 Ch. D. 964	389
—— *v.* Ball	5 De G. & Sm. 85	618
Judgment Debtor, In re A	[1908] 2 K. B. 474	668
Jupiter, In re	[1927] P. 120	930

K.

Kensington *v.* Inglis	8 East, 273	186
Kimber *v.* Adams	[1900] 1 Ch. 412	521
King *v.* Cleaveland	4 De G. & J. 477	216
Kingston Cotton Mill Company (No. 2), In re	[1896] 2 Ch. 279	868
Kitts *v.* Moore	[1895] 1 Q. B. 253	21
Knight *v.* Simmonds	[1896] 1 Ch. 653; [1896] 2 Ch. 294	906
Knowles *v.* Scott	[1891] 1 Ch. 717	610
Krell *v.* Henry	[1903] 2 K. B. 740	932
Kusel *v.* Watson	11 Ch. D. 129	849

L.

Lacey, In re	[1907] 1 Ch. 330	838
Lacey & Son, In re	25 Ch. D. 301	381
Lacteosote, Ld. *v.* Alberman	[1927] 2 Ch. 117; 44 R. P. C. 211	835
Lands Allotment Company, In re	[1894] 1 Ch. 616	610
Lassence *v.* Tierney	1 Mac. & G. 551	661
Lauri *v.* Renad	[1892] 3 Ch. 402	963
Law Guarantee Trust and Accident Society, In re	[1914] 2 Ch. 617	803
Lawes *v.* Bennett	1 Cox, 167	712
Leather Cloth Company *v.* American Leather Cloth Company	11 H. L. C. 523	832
Ledgard, In re	[1922] W. N. 105	294
Leeds Industrial Co-operative Society *v.* Slack	[1924] A. C. 851	34, 238
Leek Improvement Commissioners *v.* Stafford Justices	20 Q. B. D. 794	131, 767
Leigh's Settled Estates (No. 1), In re	[1926] Ch. 852	248, 690
Leiston Gas Company *v.* Leiston-cum-Sizewell Urban Council	[1916] 2 K. B. 428	452
Le Page *v.* Gardom	84 L. J. (Ch.) 749; [1915] W. N. 216	628

		PAGE
Les Affréteurs Réunis Société Anonyme *v.* Leopold Walford (London)	[1919] A. C. 801	182
Leslie, In re	23 Ch. D. 552	194
Lindrea, In re	109 L. T. 623	176
Lindsley's Estate, In re	63 L. J. Newsp. 375	252
Liverpool Insurance Company's Case	[1914] 2 Ch. 617	105
Llanelly Railway and Dock Company *v.* London and North Western Railway Company	L. R. 8 Ch. 942; L. R. 7 H. L. 550	175, 448
Lloyd *v.* Dimmack	7 Ch. D. 398	294
—— *v.* Fleming	L. R. 7 Q. B. 299	800
Lloyd's *v.* Harper	16 Ch. D. 290	182
Lodge *v.* National Union Investment Company	[1907] 1 Ch. 300	393
London (Mayor of), Ex parte	34 Ch. D. 452	381
London India Rubber Company, In re	L. R. 5 Eq. 519	148
London School Board, Ex parte	41 Ch. D. 547	592
Love *v.* Wyndham	1 Mod. 50	476
Low, In re	[1895] 1 Q. B. 734	668
Lowe *v.* Essex County Council	20 B. W. C. C. 452	490
Lurcott *v.* Wakely and Wheeler	[1911] 1 K. B. 905	767
Luter *v.* Sagor & Co.	[1921] 3 K. B. 532	931

M.

McCormick *v.* Grogan	L. R. 4 H. L. 82	618
Macdonald *v.* Irvine	8 Ch. D. 101	353
McEllistrim *v.* Ballimacelligott Co-operative Agricultural and Dairy Society	[1919] A. C. 548	813
McGough *v.* Lancaster Burial Board	21 Q. B. D. 323	671
Mackay, Ex parte	L. R. 8 Ch. 643	738
Maclaren *v.* Stainton	3 D. F. & J. 202	682
MacLulich *v.* MacLulich	[1920] P. 439	4
Maddock *v.* Wallasey Local Board	55 L. J. (Q. B.) 267; 50 J. P. 404	889
Magneta Time Company's Trade Mark, In re	44 R. P. C. 169; [1927] L. R. Dig. 335	409
Mainland *v.* Upjohn	41 Ch. D. 126	743
Marlborough's (Duke of) Settlement, In re	32 Ch. D. 1	589
Marman's Trusts, In re	8 Ch. D. 256	225
Marriot *v.* Hampton	2 Sm. L. C., 12th ed., p. 403	512
Mathews *v.* Keble	L. R. 3 Ch. 691	91
Matson, In re	[1897] 2 Ch. 509	585
Maxim Nordenfelt Guns and Ammunition Company *v.* Nordenfelt	[1893] 1 Ch. 630	270
Metcalfe *v.* British Tea Association	46 L. T. 31	226
—— *v.* Metcalfe	[1891] 3 Ch. 1	14
Metropolitan Electric Supply Company *v.* Ginder	[1901] 2 Ch. 799	451
Metropolitan Water Board *v.* Dick, Kerr & Co.	[1918] A. C. 119	931
—— *v.* Solomon	[1908] 2 Ch. 214	962
Milan Tramways Company, In re	25 Ch. D. 587	932

		PAGE
Milroy *v.* Lord	4 D. F. & J. 264	181
Mitchel *v.* Reynolds	1 P. Wms. 181; 1 Sm. L. C., 12th ed., 458	270
Molineaux *v.* London, Birmingham and Manchester Insurance Company	[1902] 2 K. B. 589	814
Moodie *v.* Bannister	4 Drew. 432	838
Moody, In re	[1895] 1 Ch. 101	716
Moon *v.* Durden	2 Ex. 22	963
Moore, In re	39 Ch. D. 116	466
———	[1901] 1 Ch. 936	474
——— *v.* Todd	68 J. P. 43	132
Morris *v.* Baron & Co.	[1918] A. C. 1	191
Morris' Settled Estates, In re	[1920] 2 Ch. 229	727
Morrison *v.* Barking Chemicals Company	[1919] 2 Ch. 325	295
Moses *v.* Macferlan	2 Burr. 1005	393
Mundy and Roper's Contract, In re	[1899] 1 Ch. 275	252
Muratti *v.* Murad	28 R. P. C. 497	409
Myhill, In re	[1928] Ch. 100	424, 728

N.

Nagoremull *v.* Triton Insurance Company	41 Times L. R. 168	78
National Telephone Company, In re	[1914] 1 Ch. 755	144
Nelson, In re	[1928] Ch. 920n.	917
Neuchatel Asphalte Company's Trade Mark, In re	[1913] 2 Ch. 291	407
Nichols and Von Joel's Contract, In re	[1910] 1 Ch. 43	850
Niddrie and Benhar Coal Company *v.* Dee	[1927] A. C. 299; 20 B. W. C. C. 503	485, 503
Nisbet *v.* Smith	2 Bro. C. C. 582	294
Nordenfelt *v.* Maxim Nordenfelt Guns and Ammunition Company	[1894] A. C. 535	267
North Western Salt Company *v.* Electrolytic Alkali Company	[1914] A. C. 461; [1913] 3 K. B. 422	267
Northam Bridge Proprietors *v.* South Stoneham Rural Council	71 J. P. 345	908
Norwich Equitable Fire Assurance Society. Claim of Royal Insurance Company	57 L. T. 241	77

O.

Ocean Coal Company *v.* Davies	[1927] A. C. 271; 19 B. W. C. C. 429	485, 503
Oceanic Steam Navigation Company *v.* Sutherberry	16 Ch. D. 236	847
Okura & Co. *v.* Forsbacka Jernverks Aktiebolag	[1914] 1 K. B. 715	932
Osborne to Rowlett	13 Ch. D. 774	855
Otway, In re	[1895] 1 Q. B. 812	203
Owen & Co. *v.* Cronk	[1895] 1 Q. B. 265	842

P.

		PAGE
Palmer *v.* Mallet	36 Ch. D. 411	648
Park, In re	[1910] 2 Ch. 322	353
Parker, In re	16 Ch. D. 44	467
Parker's Settled Estates, In re	[1928] Ch. 247	690
Patent Agents' Institute *v.* Lockwood	[1894] A. C. 347	318
Pawley and London and Provincial Bank, In re	[1900] 1 Ch. 58	166
Payne, In re	[1927] 2 Ch. 1	661
Pelly, Ex parte	21 Ch. D. 492	867
Perkins, In re	[1898] 2 Ch. 182	114, 799
Perlak Petroleum Maatschappij *v.* Deen	[1924] 1 K. B. 111	5
Phillips *v.* Britannia Hygienic Laundry Company	[1923] 2 K. B. 832	487
Piercy *v.* Young	14 Ch. D. 200	20
Pinto *v.* Badman	8 R. P. C. 181	831
Pitt Rivers, In re	[1902] 1 Ch. 403	628
Planché *v.* Fletcher	1 Doug. 251	880
Ponsford, Baker & Co. *v.* Union Bank of London and Smith's Bank	[1906] 2 Ch. 444	799
Poole *v.* Tumbridge	2 M. & W. 223	667
Portman *v.* Portman (Viscount)	[1922] 2 A. C. 473	590
Pullen *v.* Enthoven & Son	20 B. W. C. C. 248	490
Pumpherston Case	1909 S. C. 1292	509
Pyle, In re	[1895] 1 Ch. 724	712

Q.

Quilter *v.* Mapleson	9 Q. B. D. 672	962

R.

Ralli Brothers *v.* Compañia Naviera Sota y Aznar	[1920] 2 K. B. 287	881, 931
Ranelaugh (Lord) *v.* Hayes	1 Vern. 189	294
Rankine, In re	[1918] P. 134	480
Rawley *v.* Rawley	1 Q. B. D. 460	931
Rayer, In re	[1903] 1 Ch. 685	356
Read *v.* Price	[1909] 2 K. B. 724	838
Reg. *v.* Abney Park Cemetery Company	L. R. 8 Q. B. 515	674
—— *v.* Judge of County Court of Oxfordshire	[1894] 2 Q. B. 440	651
—— *v.* Lordsmere (Inhabitants)	54 L. T. 766	361
Reid *v.* Reid	31 Ch. D. 402	963
Reigate Corporation *v.* Surrey County Council	[1928] Ch. 359	767
Rendell, In re	[1901] 1 Ch. 230	439
Rennell *v.* Lincoln (Bishop)	7 B. & C. 113	402
Rex *v.* Kerrison	3 M. & S. 526	362
Rich *v.* Whitfield	L. R. 2 Eq. 583	377
Richards *v.* Attorney-General of Jamaica	6 Moo. P. C. 381	589
———— *v.* Delbridge	L. R. 18 Eq. 11	188
Richardson, In re	[1911] 2 K. B. 705	105, 793

		PAGE
Riordan *v.* Banon	Ir. R. 10 Eq. 469	627
Ripon (Earl) *v.* Hobart	3 Myl. & K. 169	35, 242
Robertson *v.* Willmott	25 Times L. R. 681; [1909] W. N. 155	648
Robinson, In re	[1911] 1 Ch. 502	385
——— *v.* Hardcastle	2 Bro. C. C. 22	476
——— *v.* Local Board of Barton-Eccles	8 App. Cas. 798	890
Rolls *v.* St. George the Martyr, Southwark (Vestry)	14 Ch. D. 785	908
Rowett, Leakey & Co. *v.* Scottish Provident Institution	[1927] 1 Ch. 55	413
Rowland *v.* Mitchell	13 R. P. C. 457	4
Russian Commercial and Industrial Bank *v.* Comptoir d'Escompte de Mulhouse	[1923] 2 K. B. 630; [1925] A. C. 112	929, 930
Russoff *v.* Lipovitch	[1925] 1 K. B. 628	522
Ryder and Steadman's Contract, In re	[1927] 2 Ch. 62	252, 430, 693
Rylands *v.* Fletcher	L. R. 3 H. L. 330	34
Ryves *v.* Wellington (Duke)	9 Beav. 579	388

S.

Sacker, In re	22 Q. B. D. 179	842
St. Giles Vestry *v.* London Cemetery Company	[1894] 1 Q. B. 699	674
Sandgate Urban Council *v.* Kent County Council	79 L. T. 425	361, 767
Sartoris's Estate, In re	[1892] 1 Ch. 11	842
Scattergood *v.* Edge	1 Salk. 229	476
Scholfield *v.* Spooner	26 Ch. D. 94	13
Schweder *v.* Worthing Gas Company	[1913] 1 Ch. 118	908
Schweppes, Ld. *v.* Gibbens	22 R. P. C. 113	4
Scott *v.* Brown	68 J. P. 181; 69 J. P. 89	131, 768, 785
Sea Insurance Company *v.* Rossia Insurance Company	17 Ll. L. Rep. 316	947
Seale *v.* Seale	1 P. Wins. 290	590
Selby *v.* Crystal Palace Gas Company	4 D. F. & J. 246; 31 L. J. (Ch.) 595	890
Sevenoaks, Maidstone and Tonbridge Railway Company *v.* London, Chatham and Dover Railway Company	11 Ch. D. 625	766
Severn and Wye and Severn Bridge Railway Company, In re	[1896] 1 Ch. 559	838
Sharpness New Docks and Gloucester and Birmingham Navigation Company *v.* Attorney-General	[1913] 1 K. B. 422; [1914] 3 K. B. 1; [1915] A. C. 654	127, 763, 767
Shaw, In re	83 L. T. 754	203
Sidebottom *v.* Kershaw, Leese & Co.	[1920] 1 Ch. 154	813
Silverton *v.* Marriott	52 J. P. 677	362
Simmonds *v.* Newport Abercarn Black Vein Steam Coal Company	[1921] 1 K. B. 616	506
Simmons *v.* Bolland	3 Mer. 547	305
Sims *v.* London Necropolis Company	1 Times L. R. 584	673

		PAGE
Smith, In re	[1916] 1 Ch. 523	353
—— *v.* Colbourne	[1914] 2 Ch. 533	847
—— *v.* Robinson	[1893] 2 Q. B. 53	347
Smith, Coney & Barrett *v.* Becker, Gray & Co.	[1916] 2 Ch. 86	20
Soar *v.* Ashwell	[1893] 2 Q. B. 390	394
Solicitors and General Assurance Society *v.* Lamb	1 H. & M. 716; 2 D. J. & S. 251	413
Southwark and Vauxhall Water Company *v.* Wandsworth Board of Works	[1898] 2 Ch. 603	31, 235
Spiller *v.* Turner	[1897] 1 Ch. 911	880
Spooner *v.* Brewster	3 Bing. 136; 2 C. & P. 34	673
Springett *v.* Jenings	L. R. 6 Ch. 333	24
Stilwell *v.* Mellersh	20 L. J. (Ch.) 356	353
Stock *v.* Meakin	[1900] 1 Ch. 683	344
Stringer's Case	L. R. 4 Ch. 475	869
Strohmenger *v.* Borough of Finsbury Permanent Investment Building Society	[1897] 2 Ch. 469	813
Sunderland, In re	[1911] 2 K. B. 658	204
Swain, In re	99 L. T. 604	465
Sydney Municipal Council *v.* Bull	[1909] 1 K. B. 7	877

T.

Tailby *v.* Official Receiver	13 App. Cas. 523	15
Tamplin Steamship Company *v.* Anglo-American Petroleum Products Company	[1916] 2 A. C. 397	931
Tarry *v.* Ashton	1 Q. B. D. 314	362
Taylor, In re	[1926] Ch. 923	685
——— *v.* Caldwell	3 B. & S. 826	940
——— *v.* Oldham Corporation	4 Ch. D. 395	890, 908
Tench *v.* Cheese	6 D. M. & G. 453	91
Tendring Union Guardians *v.* Dowton	45 Ch. D. 583; [1891] 3 Ch. 265	569
Thames and Mersey Marine Insurance Company *v.* Societa di Navigazione a Vapore del Lloyd Austriaco	111 L. T. 97	932
Thellusson, In re	[1919] 2 K. B. 735	126
———— *v.* Woodford	11 Ves. 112	471
Thompson, In re	55 L. T. 85	216
Thornycroft & Co. *v.* Thornycroft	44 Times L. R. 532	147
Tomlinson *v.* Gill	Amb. 330	182
Toms *v.* Clacton Urban Council	62 J. P. 505; 46 W. R. 629	40, 241
Twopeny *v.* Peyton	10 Sim. 487	917

U.

Underwood *v.* London Music Hall	[1901] 2 Ch. 309	148
United General Commercial Insurance Corporation, In re	[1927] 2 Ch. 51	936
Upjohn *v.* Hitchens	[1918] 2 K. B. 48	67

W.

		PAGE
Wainwright *v.* Miller	[1897] 2 Ch. 255	466, 706
Waite *v.* Jennings	[1906] 2 K. B. 11	963
Wakley, In re	[1920] 2 Ch. 205	54
Walker, In re	[1907] 2 Ch. 120	226
Wandsworth Board of Works *v.* United Telephone Company	13 Q. B. D. 904	362
Ward *v.* Van der Loeff	[1924] A. C. 653	24
Ware, In re	45 Ch. D. 269	216
Warner *v.* Wandsworth Board of Works	53 J. P. 471	362
Wassell *v.* Leggatt	[1896] 1 Ch. 554	390
Watkins *v.* Watkins	[1896] P. 222	921
Watts *v.* Watts	L. R. 17 Eq. 217	578
Webster and Jones' Contract, In re	[1902] 2 Ch. 551	381
Wedgwood Coal and Iron Company, In re	47 L. T. 612	872
Weeding *v.* Weeding	1 J. & H. 424	710
Weinberger *v.* Inglis	[1918] 1 Ch. 133	5
Wenham, In re	[1900] 2 Q. B. 698	668
West *v.* Gwynne	[1911] 2 Ch. 1	962
West Ham Corporation *v.* Sharp	[1907] 1 K. B. 445	569
Whitbread, Ex parte	2 Mer. 99	536
White *v.* British Empire Mutual Life Assurance Company	L. R. 7 Eq. 394	411
——— *v.* Harrow	86 L. T. 4	63
Wilcock, In re	[1898 1 Ch. 95	26
Will *v.* United Lankat Plantations Company	[1912] 2 Ch. 571; [1914] A. C. 11	144, 146
Williams, Ex parte	7 Ch. D. 138	738
Williamson *v.* Farwell	35 Ch. D. 128	707
Wood *v.* Ealing Tenants, Ld.	[1907] 2 K. B. 390; 71 J. P. 456	903, 907
Wooldridge *v.* Norris	L. R. 6 Eq. 410	298
Wroth's (Sir Thomas) Case	2 Plowd. 452	388

Y.

Young & Co. *v.* Leamington Spa Corporation	8 App. Cas. 517	452
Younghusband *v.* Gisborne	1 Coll. C. C. 400	917

Z.

Zimbler *v.* Abrahams	[1903] 1 K. B. 577	849

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

LA RADIOTECHNIQUE *v.* WEINBAUM.

CLAUSON J.

1927

June 28.

[1927. L. 570.]

Particulars—Passing-off Action—Pleading—Traverse of Plaintiff's Allegations —Pregnant Negative—Onus of Plaintiff—Rules of Supreme Court, Order XIX., *rr.* 6, 7.

An action for an injunction to restrain the sale or advertisement of wireless valves under the designation of "Radio Micro" or under any other designation so closely resembling the plaintiffs' designation as to be calculated to deceive. The plaintiffs by their statement of claim alleged that they had long been accustomed to place certain of their valves on the market under the name "Radio Micro"; that the name was well known in the United Kingdom as indicating the goods of the plaintiffs, and that cartons of a distinctive appearance containing their valves and bearing the words "Radio Micro" were well known to the trade and the public as signifying that such goods were the goods of the plaintiffs. Further, that the defendants had advertised and sold wireless valves marked "Radio Micro," packed in cartons also marked "Radio Micro," and so closely resembling the plaintiffs' cartons as to be calculated to deceive; that the goods so sold by the defendants were not the goods of the plaintiffs, but a fraudulent and obvious imitation thereof. The plaintiffs cited an instance of the type of the act complained of. The defendants having by para. 3 of their defence simply denied each and all of those allegations, the plaintiffs applied that para. 3 of the defence might be struck out, or that, in

CLAUSON J.

1927

LA RADIO-TECHNIQUE v. WEINBAUM.

the alternative, particulars might be delivered as follows:—(*a*) If it were contended that the words "Radio Micro" were in use by others than the plaintiffs, particulars of such user, stating the name of the person or firm, and the earliest date of such user; (*b*) If it were contended that the plaintiffs' cartons were not distinctive, particulars of cartons, if any, in use by other firms and relied on by the defendants and of the features alleged to be common to the trade, and by whom and when used:—

Held, on the footing of the action being one of passing-off, that the defendants' denial involved no affirmative allegations on their part, and that, as the onus lay upon the plaintiffs to establish their allegations, the Court would not order the defendants to deliver particulars of their traverse of those allegations.

SUMMONS for particulars.

In this action the plaintiffs, La Radiotechnique, by their writ claimed (1.) an injunction to restrain the two defendants named Weinbaum from infringing the plaintiffs' registered trade mark No. 465311 registered in class 8; (2.) an injunction to restrain the defendants from selling or advertising valves under the designation "Radio Micro" or "Radio Micro Special" or under any other name or designation so closely resembling the plaintiffs' name or designations "Radio Micro" and "Radio Micro Special" as to be calculated to deceive; and (3.) an injunction to restrain the defendants from using cartons for packing the valves sold by them so closely resembling the plaintiffs' cartons as to be calculated to deceive purchasers.

The relief claimed by their statement of claim, which was somewhat different from that claimed in the writ, was for an injunction to restrain the defendants from using on or in connection with or in circulars or advertisements of wireless valves not of the plaintiffs' manufacture the words "Radio Micro" and from using cartons in fraudulent or obvious imitation of the plaintiffs' cartons or so closely resembling the plaintiffs' cartons as to be calculated to deceive and from otherwise passing-off goods not being goods of the plaintiffs as and for the plaintiffs' goods. In support of the relief so claimed, the plaintiffs alleged that they manufactured wireless valves and further alleged as follows: by para. 3: "The plaintiffs have long been accustomed to place certain of their

valves on the market under the name 'Radio Micro' and such name is well known in the United Kingdom as indicating the goods of the plaintiffs"; by para. 4: "The plaintiffs have furthermore long been accustomed to put up their valves in rectangular cartons of a distinctive appearance and bearing the words 'Radio Micro,' and such cartons are well known to the trade and to the public and indicate to them that such goods are the goods of the plaintiffs; (5.) The defendants have recently put upon the market and advertised for sale and sold wireless valves marked with the words 'Radio Micro': such valves are packed in cartons marked with the words 'Radio Micro' and so closely resemble the cartons used by the plaintiffs as to be calculated to deceive. The goods so sold by the defendants are not the goods of the plaintiffs, but a fraudulent and obvious imitation thereof; (6.) As instances of the type of act complained of, the plaintiffs will rely upon the issue by the defendants in or about the month of March, 1927, of circulars offering 'Radio Micro' valves for sale, and the sale on or about March 2, 1927, of twelve valves in cartons marked as stated above to one George Edward Stevenson."

The defendants by para. 3 of their defence simply denied all those allegations in paras. 3 to 6 of the plaintiffs' statement of claim. The plaintiffs thereupon applied that para. 3 of the defence might be struck out, or that, in the alternative. particulars might be delivered as follows: (*a*) If it were contended that the words "Radio Micro" were in use by others than the plaintiffs, particulars of such user, stating the name of the person or firm, and the earliest date of such user: (*b*) If it were contended that the plaintiffs' cartons were not distinctive, particulars of cartons, if any, in use by other firms and relied on by the defendants and of the features alleged to be common to the trade, and by whom and when used.

Courtney Terrell for the applicants. The defendants may not, under the guise of a pregnant negative, set up an affirmative case: they must either say they are not setting up an

CLAUSON J. 1927 LA RADIO-TECHNIQUE v. WEINBAUM.

affirmative case or else they must give the particulars asked for. The plaintiffs say that the words are distinctive of the goods. The denial in para. 3 of the defence implies an affirmative—namely, that the goods are in common use in the trade and are not indicative of the plaintiffs' goods : the defendants therefore must give particulars. When a trade mark is on the register, it lies upon the defendants to show why it should not be there. In *Rowland* v. *Michell* (1) the defendant was ordered to give particulars of the grounds of his objection to the validity of the plaintiff's registered trade mark alleged in his defence. [He referred also to *Aquascutum, Ld.* v. *Moore & Scantlebury.* (2)] In *Schweppes, Ld.* v. *Gibbens* (3), which was a passing-off action, the defendant was ordered to deliver particulars of the common use in the trade of certain labels referred to in para. 2 of the defence.

[CLAUSON J. In that case the defendant was rash enough by para. 2 of his defence to set up an affirmative case.]

Where the defendant alleges any particular instances of user of the mark in question, he may be ordered to give particulars of such instances : *Boake, Roberts & Co.* v. *Wayland & Co.* (4)

The defendants' denial here involves the setting up of an affirmative case of which the plaintiffs are entitled to have particulars. In *MacLulich* v. *MacLulich* (5), where the action was for restitution of conjugal rights, the respondent denied that he had without any just cause withdrawn from cohabitation, and it was held that the answer was not a mere traverse, but involved an allegation that he had just cause and must give particulars of any charges or facts on which he relied as justifying his conduct. Here, the defendants deny that the words are distinctive, and they are bound to say whether they rely on their common use in the trade.

Roger W. Turnbull for the respondents. The defendants' denial is no more than an ordinary traverse of the plaintiffs' pleading and does not involve any positive allegation. The onus lies upon the plaintiffs to prove their own case, and

(1) (1896) 13 R. P. C. 457, 460.
(2) (1903) 20 R. P. C. 640.
(3) (1904) 22 R. P. C. 113, 116.
(4) (1908) 26 R. P. C. 249.
(5) [1920] P. 439.

the Court will not order the defendants to give particulars of their traverse, and such a traverse is not a "matter stated" within r. 7 of Order XIX.: *Weinberger* v. *Inglis*. (1) The defendant's answer in *MacLulich* v. *MacLulich* (2), denying that he remained away without just cause, clearly involved a positive allegation which distinguishes the present from that case. In *Perlak Petroleum Maatschappij* v. *Deen* (3), if the application had been for particulars it would not have been granted, because the defendant was content with a general denial of the plaintiffs' case and did not set up any case of his own.

[He also referred to Annual Practice, 1927, p. 337, and Yearly Practice, 1927, pp. 281, 290.]

Courtney Terrell in reply. In *Weinberger* v. *Inglis* (1) the plaintiff, having alleged in his pleading that the defendants did not exercise any discretion bona fide when they refused to re-elect the plaintiff, the defendants traversed that allegation and it was held that the traverse did not involve any positive allegation and did not entitle the plaintiff in that case to particulars of the grounds upon which the defendants came to their decision. It is submitted that the decision in that case cannot stand after the decision of the Court of Appeal in *MacLulich* v. *MacLulich*. (2)

CLAUSON J. [after observing that the relief claimed by the statement of claim was somewhat different from that claimed in the writ, continued:] The action has been referred to, in the discussion before me, as a passing-off action. I am not quite clear if that is an accurate description, having regard to the nature of the relief claimed, because, although the statement of claim contains no claim to restrain infringement of a registered trade mark, there is a claim to restrain the use of certain words in connection with goods not of the plaintiffs' manufacture, and it may be that the question may ultimately arise whether or not, so far as an injunction is claimed to restrain the use of words which are not registered as part of

(1) [1918] 1 Ch. 133. (2) [1920] P. 439.
(3) [1924] 1 K. B. 111.

CLAUSON J. 1927 LA RADIO-TECHNIQUE v. WEINBAUM.

a trade mark, this action may not be one which, having regard to the terms of the Trade Marks Act, cannot, so far as that part of the relief claimed is concerned, effectually be launched. I do not propose to deal with that question now; I will leave it to be carefully considered at the right time.

In support of the relief which they claim the plaintiffs by their statement of claim allege that they manufacture wireless valves and they make the following further allegations. [His Lordship then stated the allegations contained in paras. 3, 4, 5 and 6 of the statement of claim and proceeded:] The way in which these allegations are stated is interesting in view of the possible difficulty that the plaintiffs may have in this action, if their claim really depends upon the use by the defendants of the words "Radio Micro" upon their goods, since those words are not a registered trade mark; and, under the Trade Marks Act, an action would not lie for the infringement of an unregistered trade mark.

However that may be, the defendants have taken this course: they have simply denied all the allegations contained in paras. 3 to 6 of the statement of claim. The plaintiffs then applied that para. 3 of the defence, which puts paras. 3 to 6 of the statement of claim in issue, should be struck out or that, in the alternative, "particulars of such paragraph may be delivered as follows: (*a*) If it be contended that the words 'Radio Micro' and 'Radio Micro Special' are in use by others than the plaintiff company, particulars of such user, stating the name of the person or firm, the earliest date of such user; (*b*) If it be contended that the plaintiffs' cartons are not distinctive, particulars of cartons, if any, in use by other firms and relied on by the defendants and of the features which are alleged to be common to the trade and by whom and when used." The defendants' case on this application is a perfectly simple one. They say that the plaintiffs have made certain allegations, and the onus is upon them to prove those allegations; that they, the defendants, have simply denied those allegations, and set up no affirmative case. The plaintiffs, they say, are at liberty to prove their allegations, if they can, subject, of course, to the defendants'

cross-examination and their right to put in evidence anything which may tend to show that the evidence given by the plaintiffs is evidence which cannot be sufficiently relied upon to prove the allegations which it is needful for the plaintiffs to prove. The plaintiffs, on the other hand, say that the negative involved in the defendants' denial is what is known as a pregnant negative : that their defence on the face of it appears to be a simple traverse of the allegations stated in paras. 3 to 6 of the statement of claim ; but in reality is not a simple traverse and involves the setting up of an affirmative case, on the part of the defendants ; and they say that, in so far as the defendants are setting up an affirmative case, they are entitled to have particulars of the case the defendants are setting up, and especially particulars of the instances in which (if that be the contention of the defendants) other persons than the plaintiffs have applied the words " Radio Micro " to their goods.

My jurisdiction to order particulars depends upon Order XIX., rr. 6 and 7. Order XIX., r. 6, says that in all cases where particulars may be necessary beyond such as are exemplified in the forms, particulars shall be stated in the pleading. Rule 7 says : a further and better statement of the nature of the claim or defence, or further or better particulars of any matter stated in any pleading, may in all cases be ordered upon such terms as may be just. The nature of the defence here is perfectly clear and no further particulars are at all necessary, because the nature of the defence, so far as the particular allegations by the plaintiffs are concerned, is that the onus is on the plaintiffs to prove what they have alleged. If that were all, it is clear that under the wording of those rules I have no jurisdiction to order particulars. I have jurisdiction to order particulars in any matter stated in any pleading requiring particulars. I have then to find whether there is anything stated in the defendants' pleading in respect of which I am entitled to order particulars. The authorities show this, that the word " stated " in the rule means stated expressly or by reasonable or necessary implication. I put it in that way, because a reference to the case of *MacLulich* v.

CLAUSON J. 1927 LA RADIO-TECHNIQUE v. WEINBAUM.

MacLulich (1) in the Court of Appeal, shows that, if the denial necessarily involves and implies an allegation, the mere fact that the allegation is not stated in words will not preclude the Court from ordering particulars. What I have to ask myself in this case is: does this denial involve any allegation? I cannot see that it does. I cannot see that the defendants are setting up any affirmative case against the plaintiffs. It seems to me that it is for the plaintiffs to prove their case, and that they cannot call upon the defendants to give particulars which will merely assist the plaintiffs in preparing for trial the case which it is for them to prove. That that is the right view seems to me to be confirmed by the decision of Astbury J. in *Weinberger* v. *Inglis* (2), a case which seems to me in no respect inconsistent with the subsequent decision of the Court of Appeal in *MacLulich* v. *MacLulich*. (1) It is contended by counsel for the plaintiffs that, having regard to that decision, *Weinberger* v. *Inglis* (2) should have been decided differently. I am assisted also by the statement of Bankes L.J. in the case of *Perlak Petroleum Maatschappij* v. *Deen*. (3) It is true that there the matter arose in regard to interrogatories, and he dealt only incidentally with the matter of particulars. He says (4): "If an application had been made for particulars it ought not to have been granted, because the defendant has contented himself with a general denial of the plaintiffs' case and has not set up any case of his own to which an order for particulars would be applicable." I was told that the practice in passing-off actions was, however, that the defendant would be called upon to define what I may describe as his line of opposition to the case which the plaintiff proposed to set up in regard to what may be conveniently called the monopoly claimed by the plaintiff in regard to the distinctive manner in which his goods are placed upon the market. I have looked at a number of authorities to which I have been referred and, with the exception of one with which I will deal presently, they are cases of infringement

(1) [1920] P. 439.
(2) [1918] 1 Ch. 133.
(3) [1924] 1 K. B. 111.
(4) Ibid. 114.

of trade mark. If this were a case in which the plaintiff was seeking to restrain infringement of his trade mark, the position would, as it seems to me, be quite different. Where a plaintiff is seeking an injunction to restrain the defendant from infringing a registered trade mark, there is no onus on the plaintiff to prove anything, except that the trade mark is registered. It may often happen that in such a case the defendant is minded to dispute the validity of the registration and may do so on various grounds, one being that the mark ought never to have been registered as being common to the trade and not distinctive. In such a case the defendant must, of course, give particulars of the allegations which he is bound to prove, and there are a number of cases in which he has been directed to deliver them.

If, where the plaintiff is seeking to restrain passing off and is not seeking to enforce a registered trade mark, the defendant is ill advised enough not to confine himself to a denial of the plaintiff's case, but to plead affirmatively that the particular "get up" of the plaintiff's goods is in common use in the trade, it may be that particulars will be ordered of such an allegation, and *Schweppes, Ld.* v. *Gibbens* (1) is a case in which, in those circumstances, such particulars seem to have been ordered. I cannot find that in that case there was any discussion as to whether any particulars were to be given or not. If a defendant inserts in his defence a gratuitous allegation, and is called upon to give particulars of that allegation, he must no doubt either abandon his gratuitous allegation or give particulars; and the fact that under such circumstances particulars have been ordered does not seem to me to show at all that a defendant, who is content to rely merely upon a denial of the allegations which the plaintiff is bound to prove, ought in a passing-off case to be ordered to give such particulars as were ordered in the case of *Schweppes, Ld.* v. *Gibbens.* (1) Accordingly I cannot find that I am bound by any practice, and I cannot find any ground on which I am entitled to order the suggested particulars.

(1) 22 R. P. C. 113.

CLAUSON J. 1927 LA RADIO-TECHNIQUE v. WEINBAUM.

There is one other case to which I ought to refer, and that is *Boake, Roberts & Co.* v. *Wayland & Co.* (1) I have read the report, and find considerable difficulty in following the exact ratio decidendi. However, there was an injunction claimed to restrain infringement of a registered trade mark mixed up with a passing-off claim. I find nothing in that case upon which I can rely for the purpose of assisting me in coming to any other decision than that to which, as it seems to me, I am bound on principle to come. Accordingly, I shall refuse the application of the plaintiffs, and I think it is a case in which the costs of the application ought to be the defendants' costs in any event.

Solicitors: *Philip Conway, Thomas & Co.; Edward Fail.*

H. C. H.

CLAUSON J. 1927 *July* 22.

In re SMITH.

FRANKLIN *v.* SMITH.

[1927. S. 963.]

Settlement—Covenant to settle after-acquired Property — Will made after Covenant—Construction—Forfeiture—Bequest of Income to Covenantor for Life, until any Event should happen whereon his title to the Income would cease.

By an ante-nuptial indenture of settlement made in 1898, the husband covenanted to settle all property to which during the continuance of the marriage he should become entitled not exceeding in the aggregate 1000*l.*, upon trusts under which the wife and husband were entitled to successive life interests with remainder over in favour of the children of the marriage.

Under the trusts of the will (made in 1920) of his father, who died in 1926, the husband became entitled during his life to receive the income of certain property, until any event should happen in consequence of which he would cease to be so entitled; and after the determination of the trusts in his favour, there was a gift over of that property. The will contained an expression of the testator's intention that the benefits accruing to the husband under his will were not to be affected by his covenant to settle after acquired property:—

Held, that the equitable assignment of the husband's life interest under his father's will at the moment of the testator's death would

(1) 26 R. P. C. 249.

have constituted an event within the meaning of the will, if the covenant applied to it; but that, as the effect of the covenant would thus be to destroy that interest at the moment of its creation, the husband's covenant had no application to it; with the result that his life interest was not forfeited, but continued to subsist under the trusts of his father's will.

ORIGINATING SUMMONS.

By an indenture of settlement dated October 11, 1898, and made upon the marriage of Martin Gwynne Smith with Etheldreda Mary Smith (then Miss E. M. Landon), it was, amongst other things, agreed and declared that all real and personal property to which Martin G. Smith at the time of the marriage or at any time during the continuance thereof, whether in possession, reversion or otherwise not exceeding in the aggregate the sum of 1000*l.*, should so soon as circumstances would admit be assured and transferred by him and all other necessary or proper parties unto or otherwise vested in the trustees (parties thereto) of the settlement. The trusts declared of the property to be so vested in the trustees were that they should call in and convert into money such part or parts as should not consist of money and stand possessed of the moneys to arise therefrom and the investments representing the same upon trust to pay the income thereof to Etheldreda M. Smith during her life if she should then be living or if she should not then be living to pay the income to her said husband if he should then be living and after the decease of the survivor of them in trust for the children of the marriage who should attain the age of twenty-one years in equal shares. The settlement contained a proviso that if any property to become vested in the trustees should consist of an annuity or of the rents or income of real or personal property payable to Martin G. Smith during his life such annuity rents and income should not be sold, unless he should so direct, but the annuity rents or income should, unless and until the same should be sold, be paid to the person or persons to whom the income of the moneys to arise from such sale calling in and conversion should for the time being be payable under the trusts thereinbefore contained.

By his will dated January 21, 1920, Thomas Gwynne Smith,

CLAUSON J. 1927 SMITH, *In re.* FRANKLIN *v.* SMITH.

the father of the settlor, devised and bequeathed to the trustees thereof his messuage called the Red House, his trade effects and a sum of 200*l.* with the following directions: "My trustees shall during the life of my son Martin Gwynne Smith or until he shall do or attempt to do or suffer any act or thing or until any event shall happen by or in consequence of which he would cease to be entitled to receive the same or any part thereof pay the net rents and profits of the Red House premises to my said son or permit him to receive the same or permit him to occupy the Red House premises, and shall during the same period permit my said son to have the full use and enjoyment of my trade effects, and shall during the same period set apart the said sum of 200*l.* with power to invest the same and shall from time to time pay the income arising therefrom to my said son." From and after the determination of those trusts the testator directed that his trustees should stand possessed of the premises so devised and bequeathed to them upon trusts in favour of his son's wife Etheldreda Smith during her life and from and after the determination of the trusts in her favour should stand possessed of those premises upon trusts for his son's children to be equally divided between them. The testator then stated that his object and intention in creating the foregoing trusts was to establish his son in the business carried on by himself for many years, and that such benefits as accrued to him under the trusts and provisions in his favour contained in his will should not be liable to become subject to or be affected by any covenant he might have entered into in the settlement made upon his marriage for settlement of after-acquired property, but that he should have to the fullest possible extent the personal benefit of whatever provision the testator was able to make for him by his will.

The testator died on July 16, 1926. There was issue of the marriage between Martin G. Smith and his wife three children, each of whom attained the age of twenty-one years, and one of whom died a spinster and intestate in 1923. The summons was taken out by the present trustees of the

testator's will for the determination of the questions whether upon the true construction of the will and the settlement and in the events which had happened, the interest of the defendant Martin Gwynne Smith under the trusts of the will in the several properties devised and bequeathed as aforesaid ought pursuant to the covenant in the settlement contained, to be assured and transferred by him to the trustees of the settlement, and if not, whether his interest under the trusts of the will were still subsisting or had determined.

C. L. Fawell for the trustees of the will.

David Bowen for the defendant Martin G. Smith. It is not contended that the expression of the testator's intention that his son's interest under his will should not be subject to his son's covenant to settle after-acquired property can have any effect upon that covenant, if the property fits the covenant and the covenant fits the property: *Scholfield* v. *Spooner*. (1) But the parties to the covenant could not be held to have intended that the covenant should apply to any property which would, if the covenant applied, cease to exist. In the present case, therefore, the son's interest under his father's will is not caught by the covenant, for the death of the testator, coupled with the assignment in equity by the son of his interest under the will, would otherwise constitute an event within the construction and intention of the will, which would work a forfeiture of that interest. The effect of the covenant being to work a forfeiture of that interest, it would be idle to hold that the covenant applied: *In re Crawshay* (2); *In re Allnutt*. (3) The result is that, as the covenant must be taken not to have affected the son's interest under the will, that interest is not subject to the forfeiture clause, but remains in full force: *In re Crawshay*. (2)

F. E. Farrer for the covenantor's wife and children. The will trustees should, during the lifetime of Martin G. Smith, pay the income to the settlement trustees until the 1000*l*. is satisfied and, after satisfaction, then to him. *In re*

(1) (1884) 26 Ch. D. 94. (2) [1891] 3 Ch. 176.
(3) (1882) 22 Ch. D. 275, 280.

CLAUSON J. 1927 SMITH, *In re.* FRANKLIN *v.* SMITH.

Crawshay (1) is distinguishable, because in that case a then past as well as a future event was expressed in the will itself as a cause of forfeiture. Here, unlike *In re Crawshay* (1), the event referred to in the will as to occasion a forfeiture is grammatically a future event only, and the testator's subsequent expression of intention that this very covenant, which he actually mentions in the will, should not affect the interest accruing to his son under his will rules out a forced and unnatural construction, giving to words of futurity a retrospective operation, reluctantly placed upon a clause of forfeiture in the event of bankruptcy (see *Metcalfe* v. *Metcalfe* (2) and *In re Chapman* (3)), and shows that this past covenant and its consequences did not constitute such an event as the testator refers to in his will as occasioning a forfeiture of his son's life interest thereunder. Effect therefore can be given to both the covenant and the will bequeathing the life estate without occasioning its forfeiture, by payment of the income under the will to the settlement trustees up to 1000*l.*, and, should he survive such payment, by payment thereafter of the income to him under the trusts of the will. If it be said that the death of the testator is in itself such a future event within the meaning of the forfeiture clause, in that it brings the covenant into immediate operation, the answer is that the future event contemplated by the testator is a contingent event only, whereas the testator's death is a certain event. Further, upon the construction of the clause in the will, the son could not " cease " to be entitled to what he never became entitled.

J. M. Paterson for the settlement trustees supported the last contention.

CLAUSON J. [having read the covenant in the settlement and the will of the covenantor's father and having stated the material facts proceeded :] In this case the question arises whether upon the proper construction of the covenant by the son in 1898 to settle his after-acquired property and

(1) [1891] 3 Ch. 176. (2) [1891] 3 Ch. 1.
(3) [1904] 1 Ch. 431.

of his father's will made in 1920, the trustees of the will became at the moment of the testator's death legally bound to assign to the trustees of the son's settlement the interest given to the son by the will of his father in any of the properties therein specified up to the value of 1000*l.*, the amount mentioned in the covenant.

That the provision in the will by which the testator attempted to exclude the benefits accruing to his son under his will from the operation of the covenant which had long before been entered into cannot be allowed to affect the operation of that covenant is clearly established by the decision of *Scholfield* v. *Spooner* (1), where it was held that where a covenant has been entered into for settlement of future acquired property, and a gift is afterwards made to the covenantor of such a nature as to come within the terms of the covenant, no expression of the intention of the donor that it shall not be settled will exclude it from the operation of the covenant.

If upon the testator's death it became the son's duty to perform his covenant by procuring the transfer of his interest under his father's will to the settlement trustees—as, clearly, it would be his duty, if the covenant applies to his interest under the will notwithstanding the presence of the provision for forfeiture in the gift to him in the will—the question then arises, does that circumstance constitute an event within the meaning of the gift of the protected life interest in the will, the happening of which must work a forfeiture of that gift? As between the son and the trustees of his settlement, at the moment of his father's death they had then the right to call upon him to perform his covenant, and, having regard to the principle that equity treats that as done which ought to be done—see Lord Macnaghten's speech in *Tailby* v. *Official Receiver* (2)—the position, upon the death of the testator, was that the son must be taken to have then transferred his interest under the will to the trustees of his settlement, if the covenant applied to that interest, with the result that an event was brought about during the subsistence of that

(1) 26 Ch. D. 94. (2) (1888) 13 App. Cas. 523, 546, 547.

CLAUSON J. 1927 SMITH, *In re.* FRANKLIN *v.* SMITH.

interest which by the terms of the gift resulted in its being forfeited.

Then, as to the effect of the settlement upon the gift in the will: having regard to the decision in *In re Crawshay* (1), and applying the reasoning of that decision in construing the covenant to settle after-acquired property, I feel bound, if I can, so to construe it, that it shall not extend to an interest of such a nature that, if it were covered by the terms of the covenant, it would be destroyed at its birth, with the result that none of the persons intended to be benefited under the covenant would obtain any benefit thereunder or from its destruction. The interest here is of such a character that, if the covenant does in terms apply to it, the effect of the covenant itself is to destroy the interest as soon as created. I am accordingly bound, if possible (and in my opinion it is possible), to construe the covenant so as not to apply to the interest given by the will. Therefore, since the covenant does not apply to the interest given by the will, there is nothing to deprive the son of that interest and no forfeiture of it has taken place, with the consequence that the son's interest under the will must continue to subsist, until some event (other than the death of the testator, coupled with the existence of the settlement of 1898) shall happen which under the provision in the will will effect a forfeiture.

Solicitors: *Clinton & Co., for Harrisons & Ricketts, Worcester; Vizard, Oldham, Crowder & Cash, for Garrard & Anthony, Worcester.*

(1) [1891] 3 Ch. 176.

H. C. H.

DE LA GARDE *v.* WORSNOP AND COMPANY.

CLAUSON J.

1927

May 13, 16.

[1927. D. 533.]

Arbitration—Agreement for Sale of Business—Subject to Condition expressed in Agreement—Submission of Disputes as to any Clause in Agreement—Staying Proceedings—Questions of Fact—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.

The defendants by an agreement in writing contracted with the plaintiff for the sale to him of their business of the manufacture and sale of certain electric batteries. The agreement (by clause 5) was expressed to be subject to the following condition, that "the tests which are now being carried out by or on behalf of the purchaser prove to his reasonable satisfaction that the Alklum electric batteries now being made by the vendors are capable of fulfilling the claims made by them." By clause 12 it was provided that, if any dispute should arise between the parties as to the agreement or any clause, matter or thing therein contained or the intention or construction thereof or in any wise relating thereto, the same should be referred to two persons therein named as arbitrators under the Arbitration Act, 1889. Part of the purchase money was, in pursuance of the agreement, paid by the plaintiff by way of deposit. The plaintiff however refused to complete the purchase, alleging that in consequence of the non-fulfilment of the condition he was no longer bound by the agreement. The defendants insisted that the condition was satisfied and gave notice of the pending dispute to the arbitrators and requested them to proceed with the reference, the plaintiff issued a writ claiming a declaration that the agreement was determined and no longer binding on the parties and repayment of the deposit. The defendants thereupon issued a summons asking for a stay of the proceedings in the action pursuant to s. 4 of the Arbitration Act, 1889 :—

Held, that, if the condition were in fact not fulfilled, the plaintiff's obligation under the contract came to an end in accordance with the terms expressed in the contract itself and not by reason of the occurrence of an event dehors the consideration of the contracting parties, and that, therefore, the agreement to refer the dispute (which was one within the meaning of it) to arbitration was still binding between the parties and the action must be stayed.

Summons to stay action.

By an agreement dated July 29, 1926, made between the defendants Worsnop & Co., Ld., as vendors, and the plaintiff De La Garde, as purchaser, it was agreed that the vendors should sell and the purchaser should purchase certain property and assets of the defendant company, comprising the goodwill, letters patent, trade marks, stock-in-trade and other subsidiary property relating to the business of the

CLAUSON J. 1927 DE LA GARDE v. WORSNOP & Co.

manufacture and sale of Alklum electric batteries carried on by the defendant company at Halifax in the county of York. The consideration for the sale was 15,000*l.*, of which 750*l.* was paid on the signing of the agreement by way of deposit and as part payment of the purchase money, and the remainder of the consideration was to consist of shares in a company about to be formed. Clause 5 of the agreement was in these terms: "The agreement is subject to the conditions following: (1.) that the tests which are now being carried out by or on behalf of the purchaser prove to his reasonable satisfaction that the Alklum electric batteries now being made by the vendors are capable of fulfilling the claims made by them. (2.) That the said batteries as so made do not infringe any existing patents." Then there were provisions that the agreement should be completed on November 30, 1926, and that the defendants should retain possession of the property until completion and in the meantime carry on the business and maintain the same as a going concern. It was further provided by clause 11, as follows: "If any dispute shall arise between the parties as to the agreement or any clause, matter or thing therein contained or the intention or construction thereof or in any wise relative thereto the same shall be referred to Thomas Johnstone Cunningham and John George Royce as arbitrators under the Arbitration Act, 1889, whose decision or the decision of their umpire in case they disagree shall be final and conclusive." The 750*l.* deposit money was provided, of which 500*l.* was deposited in the name of the plaintiff and one Carl L. Berg, who was on that account made a formal defendant to the action.

In December, 1926, the plaintiff refused to complete the purchase on the ground, as he alleged, that his experts reported that the tests they had made of the batteries failed to substantiate the representations made about them by the defendants upon the faith of which the plaintiff alleged he had entered into the agreement. The defendants, on the other hand, maintained that the tests referred to in clause 5 were tests in course of being made by or on behalf of the plaintiff

previous to the execution of the agreement and that the plaintiff had assured the defendants before the execution thereof that those tests were proving satisfactory and would be finally completed within a few days, and that it was on the faith of that assurance that they consented to the condition in clause 5 being inserted, and that in the month of August, 1926, the plaintiff represented to them that the tests were completed to his satisfaction. The plaintiff disputed the defendants' version of the facts and maintained that the defendants were aware that he left to go to America in July, 1926, for the purpose of having tests made, and that the tests referred to in the agreement were not completed.

On March 10, 1927, the defendants gave notice of the pending disputes to the arbitrators appointed under the submission and requested them to proceed in the reference. On March 15, 1927, the plaintiff challenged the jurisdiction of the arbitrators and issued the writ in the action claiming (1.) a declaration that the agreement had been determined and was no longer binding on the parties thereto, and (2.) payment to the plaintiff of the deposit moneys of 750*l*. On March 24, 1927, the defendants issued the summons against the plaintiff asking as follows: "that all further proceedings in the action may be stayed until further order pursuant to s. 4 of the Arbitration Act, 1889, the plaintiff and the said defendants having, under their submission contained in the agreement in the writ mentioned, agreed that all disputes arising between them as to the said agreement or any clause, matter or thing therein contained or the intention or construction thereof should be referred to arbitration as in the said agreement mentioned."

Clayton K.C. and *Wilfrid Hunt* for the applicants. The question in dispute relates to the tests; whether the condition stated in clause 5 of the agreement, which is a condition subsequent and not precedent, has been fulfilled. It is not a question arising dehors the contract, but out of the contract itself, and is covered by the arbitration clause. It is a question which was foreseen and expressly provided against by the

CLAUSON J. 1927 DE LA GARDE v. WORSNOP & Co.

parties. Further, it is a question of fact and not of law: *Smith, Coney & Barrett* v. *Becker, Gray & Co.* (1)

Spens K.C. and *W. F. Swords* for the respondent. There was no subsisting contract at the date of the issue of the writ in the action. The agreement was subject to the condition precedent that the tests should prove satisfactory to the purchaser. The purchaser's obligations under the contract became effective only upon the fulfilment of the first condition in clause 5; in other words, the contract was provisional upon the condition being fulfilled. The question does not arise out of the contract, but is dehors the contract and therefore is not a matter within the submission to arbitration. The respondent is entitled to repayment of the deposit money not by force of any term of the contract, but as a legal consequence of his obligations under the contract never having become effective owing to the non-fulfilment of the precedent condition. Before the arbitrator can have jurisdiction the applicants must show that there is a submission to arbitration and, further, the question in dispute must be one which has arisen under a contract then subsisting. But if the frustration of the contract has been brought about before the dispute has arisen with regard to frustration or its cause or its consequence, then the contract having come to an end, the arbitration clause must come to an end with the contract of which it forms part: *Hirji Mulji* v. *Cheong Yue Steamship Co.* (2) That is what has happened in the present case. The question whether the condition in clause 5 is a condition precedent or subsequent is for the Court to determine, as in *Grey* v. *Tolme* (3), where the question whether the contract was dissolved or only suspended was decided to be a question for the Court, and the question whether the submission to arbitration survived was not determined. In *Piercy* v. *Young* (4) the question whether the matter in dispute was within the submission to arbitrate was one for the Court to decide: Russell on Arbitration, 11th ed., p. 70. The

(1) [1916] 2 Ch. 86.
(2) [1926] A. C. 497, 502, 505.
(3) (1914) 31 Times L. R. 137.
(4) (1879) 14 Ch. D. 200.

Court will restrain a defendant from proceeding to arbitration, where an action has been brought impeaching the contract containing the submission to arbitrate: *Kitts* v. *Moore*. (1) If the submission to arbitrate is still in force, the question here is one of law, and the Court in the exercise of its discretion ought to determine it.

Clayton K.C. in reply. In *Hirji Mulji* v. *Cheong Yue Steamship Co.* (2) an event supervened which was not within the contemplation of the parties and consequently not provided against by the contract; and the same was the case in *Piercy* v. *Young*. (3) Those cases are distinguishable from the present, where the event was anticipated and provided for. In *Grey* v. *Tolme* (4) the question was one of law and did not arise out of the contract, and *Kitts* v. *Moore* (1) shows the distinction between a case where the parties have anticipated and provided for a particular event and a case where the event arises dehors the contract. Here the contract came into operation before the tests were made in pursuance of its provisions, and came to an end (if at all) through the non-fulfilment of a condition expressly mentioned in the contract itself.

CLAUSON J. stated the facts above set out and proceeded as follows: It has been contended on behalf of the plaintiff, that the condition relating to the testing of the batteries stated in clause 5 of the agreement has not been fulfilled and that he is no longer bound by his agreement to purchase, and it is upon that footing, as appears from the endorsement on the writ, that this action has been commenced. The defendants, however, apply, as they are entitled to do, under s. 4 of the Arbitration Act, 1889, to stay the action and to refer the matter to arbitration. Prima facie, if I am satisfied on construing the document that the question between the parties is a matter which is comprised in the submission effected by the arbitration clause, then I think it is not inaccurate to say that, assuming it to be reasonably clear

(1) [1895] 1 Q. B. 253.
(2) [1926] A. C. 497, 502, 505.
(3) 14 Ch. D. 200.
(4) 31 Times L. R. 137.

CLAUSON J.
1927
DE LA GARDE v. WORSNOP & Co.

that there is some question in issue other than a pure question of law—for if that were the case the Court would, according to the ordinary practice probably, though not certainly, retain the action—it is my duty to stay the proceedings in this action with a view to the matter going to arbitration.

The point which is made by the plaintiff, who opposes this application, is this: he says that the subject-matter in dispute is the question whether the first condition referred to in clause 5 has or has not been fulfilled, and that that is a matter which is not within the arbitration clause. He says that if that condition has not, in fact, been fulfilled—and he says it has not—the contract is at an end, and that it is settled by authority which is binding upon this Court that, if the contract is at an end the arbitration clause contained in that contract is no longer effective and can no longer be treated as a binding submission, and accordingly the provisions as to the stay of the action in the Arbitration Act, 1889, would not apply. In my opinion that argument is based upon a fallacy. If it be the fact that the condition has not been fulfilled, the result, no doubt, is this, that the obligation of the plaintiff to purchase has come to an end and cannot be enforced against him; but it has come to an end, not by reason of the occurrence of some event outside the consideration of the contracting parties, but by reason of certain events which have occurred and which by reason of the non-fulfilment of a condition, namely, the condition stated in clause 5, subject to which the contract was expressly made, have resulted in his no longer being under an obligation to purchase.

This dispute whether or not, according to the true construction of clause 5, in the light of the circumstances which have occurred, the plaintiff is or is not released from his obligation to purchase, seems to me to be a dispute arising as to "a clause, matter or thing in this agreement contained or otherwise relative thereto." The plausibility in the plaintiff's argument arises out of the fact that there are cases where a contract having been entered into with an arbitration clause, comes to an end, not because one of the parties to the contract

is, according to its terms as construed with reference to the events which have happened, released from his primary obligation under it, but because the contractual relation between the parties is destroyed, either owing to some fraud or some entirely external circumstance supervening, such a circumstance as supervened in the case in the Privy Council which has been referred to of *Hirji Mulji* v. *Cheong Yue Steamship Co.* (1), where the contract had been frustrated by reason of the interposition of the Government by requisitioning the ship which was the subject-matter of the contract. It is true that if, for some reason of that kind, that is to say, by reason of something occurring dehors the contract, the contract is brought to an end, when it is brought to an end the clause providing for submission to arbitration will die with it; but that does not seem to me to be this case. I see no reason for doubting that this submission clause is still a binding contract between the parties and that in this particular case there are plainly rights arising from the contract originally entered into which have to be worked out as between the parties. That, indeed, is really recognized by the plaintiff when, in the endorsement of his writ, he claims the return of the deposit which was paid under the contract.

It appears to me that the defendants' application is justified and that no course is open to me, except to stay proceedings in the action and refer the matter to arbitration.

The order that I make will be: Stay all further proceedings in this action until further order. Order that the plaintiff do pay the defendants' costs of this application and that the residue of the costs of the action be in the discretion of the arbitrators.

Solicitors: *Reid Sharman & Co.; Sheard, Breach & Co.*

(1) [1926] A. C. 497.

H. C. H.

ASTBURY J.

1927

Oct. 19.

In re DAVIES.

THOMAS *v.* THOMAS-DAVIES.

[1927. D. 913.]

Will—Specific Devise—"All my farms in B parish"—Subsequent Purchase of new Farm in B Parish—Codicil devising new Farm to other Persons—Partial Failure of codicillary Dispositions—Devolution of new Farm—Will speaking from Death—Contrary Intention—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 24.

By clause 8 of his will dated June 24, 1871, a testator devised "all my farms and lands in the parish of Bedwas" upon certain settled trusts.

By clause 14 he gave his residuary real and personal estate upon certain residuary trusts.

By a codicil dated February 13, 1873, the testator, after reciting that he had lately purchased Farm A in the parish of Bedwas, thereby gave Farm A to his daughter for life and at her death to his grandson Joseph and the heirs of his body, but with no ultimate disposition of the fee simple.

The testator died on May 31, 1873. His grandson Joseph died on January 21, 1883, an infant without issue. The testator's daughter died on February 20, 1927:—

Held, that the fee simple in Farm A being undisposed of by the codicil passed, not under the general residuary devise in clause 14 but, under the devise of "all my farms" in Bedwas in clause 8, which devise was unrevoked by the codicil as regards the fee simple, and, no intention to the contrary appearing by the will or codicil, spoke from the testator's death under s. 24 of the Wills Act, 1837.

Springett v. *Jenings* (1871) L. R. 6 Ch. 333 distinguished.

Ward v. *Van der Loeff* [1924] A. C. 653, 665, 671 and *Doe* v. *Marchant* (1843) 6 Man. & G. 813, 826 applied.

ORIGINATING SUMMONS.

By clause 8 of his will dated June 24, 1871, a testator devised "all my farms and lands in the parish of Bedwas in the County of Monmouth" upon certain settled trusts under which, on the failure of all prior interests on February 20, 1927, the defendant Joseph Thomas-Davies, who attained his majority on December 24, 1925, became equitable tenant in tail in possession.

By clause 14 the testator devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion, the proceeds to be held upon the residuary trusts therein declared.

By a codicil dated February 13, 1873, the testator, after reciting that he had lately purchased Farm A in the parish of Bedwas and Llanvabon, thereby gave that farm to his daughter during her life and at her death to his grandson Joseph and the heirs of his body. The farm was in fact wholly in the parish of Bedwas.

The testator died on May 31, 1873. His grandson Joseph died on January 21, 1883, an infant and without issue. The testator's daughter died on February 20, 1927.

The trusts of the farm declared by the codicil having thus partially failed the question arose whether it passed under clause 8 or under the residuary trusts of clause 14.

On May 7, 1927, the trustees issued this summons to determine this and other points.

G. D. Johnston for the trustees.

Baden Fuller, *Stafford Crossman* and *Wilfrid Hunt* for the residuary legatees.

Sect. 24 of the Wills Act, 1837, provides that every will shall be construed "with reference to the real estate and personal estate comprised in it" to speak as if executed immediately before the testator's death "unless a contrary intention shall appear by the will."

Sect. 25 provides that: "Unless a contrary intention shall appear by the will" any real estate or interest therein comprised in any devise incapable of taking effect "shall be included in the residuary devise (if any) contained in such will."

Now clause 8 only devises lands in a particular parish. That is not a residuary devise within s. 25 at all: *Springett* v. *Jenings*. (1) Even therefore if Farm A could be brought within the words "all my farms" in Bedwas, it was taken out by the codicil and on failure of the codicillary limitations, it could only be caught by the general residuary clause, i.e., clause 14.

But the true view is that Farm A was never within clause 8 at all. It was bought subsequently to the will, and the

(1) L. R. 6 Ch. 333.

ASTBURY J. 1927 DAVIES, *In re.* THOMAS *v.* THOMAS-DAVIES.

codicil shows a clear contrary intention within s. 24—namely, that Farm A should not pass under the devise of "all my farms" in Bedwas.

Turnbull for Joseph Thomas-Davies. Clause 8 devises "all my farms" in Bedwas. Apart from the codicil, that would pass Farm A acquired before the testator's death. The codicil partially alters the devolution of Farm A, but does not revoke the devise of the fee simple in clause 8. So far therefore as unaltered, clause 8 stands: *Ward* v. *Van der Loeff* (1); *Doe* v. *Marchant* (2); *In re Wilcock.* (3) There is no contrary intention within s. 24. The same principle applies to the implication of a contrary intention, as to the implication of a revocation.

Lawrence Tooth for another party.

Baden Fuller in reply. The three cases last cited were cases relating to residuary gifts and to the limited extent of the revocation implied by a codicillary modification. The present question, reading the will and codicil together as one document, is what did the testator mean to pass by the devise of "all my farms" in Bedwas. He clearly intended Farm A to pass by the codicil and not by clause 8. This is a clear contrary intention within s. 24. Apart from that, clause 8 is only a devise of a particular residue, and the case is covered by *Springett* v. *Jenings.* (4)

ASTBURY J. [after stating the facts and reading ss. 24, 25 of the Wills Act, 1837:] The residuary legatees contend that the will and codicil ought to be read as if the testator had devised Farm A on the trusts of the codicil and devised all the other farms in Bedwas upon the trusts of clause 8. They say in other words that he intended one portion of the Bedwas farms to pass under the codicil, and the other portion under clause 8. If that is the true construction, they say that the undisposed of interest in Farm A passes under the general residuary devise of clause 14, there being no contrary intention within s. 25.

(1) [1924] A. C. 653, 665, 671.
(2) 6 Man. & G. 813, 826.
(3) [1898] 1 Ch. 95.
(4) L. R. 6 Ch. 333.

The defendant Joseph Thomas-Davies on the other hand, who is interested under clause 8, contends that that clause is a general devise of all the testator's farms in Bedwas at his death, that Farm A, so far as the specific devise in the codicil fails, passes under clause 8, and that there is no contrary intention within s. 24.

The residuary legatees rely upon *Springett* v. *Jenings*. (1) In that case a testatrix gave certain lands in the parish of Hawkhurst to the Pipers as joint tenants and devised "the rest of my freehold hereditaments in the parish of Hawkhurst" to the plaintiff. The devise to the Pipers failed, being made on a secret trust for charity. It was held that those lands did not pass under the devise to the plaintiff.

It is difficult to see how any other conclusion could have been arrived at. There were two plain specific devises, first, particular lands in Hawkhurst, and secondly, the rest of the lands in Hawkhurst. The latter was a clear specific devise of the lands in Hawkhurst except those first devised. In that case James L.J. said (2): "The question is, whether the gift contained in this will of what has been called a particular residue of lands in a particular parish amounts to a residuary devise within the meaning of s. 25 of the Wills Act. The words are: 'I devise the rest of my freehold hereditaments situate in the parish of Hawkhurst,' etc. There is no doubt that the word 'rest' may, in certain cases, have the character of what is called a residuary devise either general or particular, but that must be upon the construction of the particular instrument. In [*Attree* v. *Attree* (3)] the case last cited the testator, in substance, said: 'I give a portion of my property to A, and I give the rest to B'; that means the rest of all he had in the world, and the gift was a general residuary devise. But it seems to me impossible to apply that construction where what is given is the residue or the 'rest' of property in a particular place, of some property out of which there was a previous gift." Mellish L.J. said (4): "First of all there is a specific

(1) L. R. 6 Ch. 333.
(2) L. R. 6 Ch. 335.
(3) (1871) L. R. 11 Eq. 280.
(4) L. R. 6 Ch. 336.

ASTBURY J. 1927 DAVIES, *In re.* THOMAS *v.* THOMAS-DAVIES.

devise of these lands [in Hawkhurst] to the Pipers . . . . on a secret trust for charitable purposes. Then the testatrix devises to the appellant 'the rest of my freehold hereditaments situated in the parish of Hawkhurst.' Now, as a matter of construction, it is impossible to infer from those words that she had any intention to pass to the appellant these particular lands which she had before devised to the Pipers. This appears . . . . to distinguish the case from those . . . . cited respecting . . . . a particular residue of personal property, for every one of those cases appears . . . . to have gone upon this, that from the language of the testator it was to be inferred that he intended the particular property, if the gift of it failed, to pass under the bequest of the particular residue of that description of property."

It is very difficult to apply the above reasoning to the present case. Here the testator devises "all my farms and lands in the parish of Bedwas" on the trusts of clause 8. That must mean what it says—namely, that all the testator's farms and lands in Bedwas at his death so far as not otherwise disposed of are to pass under clause 8. By his codicil he recites the purchase of Farm A and devises it on trusts that partially fail. But Farm A being a farm in Bedwas not effectually otherwise disposed of has not ceased to be a farm at Bedwas within the meaning of clause 8.

There are numerous authorities on this point, but I need only refer to two.

In *Ward* v. *Van der Loeff* (1) a testator gave his residuary estate to trustees upon trust for his wife for life and after her decease, in default of children which happened, upon trust for his brothers' and sisters' children as his wife should appoint and in default of appointment upon trust for all those children in equal shares. By a codicil the testator revoked the wife's power of appointment and gave his residue after her death on trusts void for remoteness. It was held that, the gift in the codicil being inoperative, there was no implied revocation of the gift in the will, which therefore took effect. Viscount Cave said (2): "I conclude, therefore,

(1) [1924] A. C. 653. (2) [1924] A. C. 665.

that the gift in the codicil is void; and it remains to consider whether the gift in the will fails also. In my opinion it does not. The codicil, while it expressly revokes the power of appointment given to the testator's wife by the will, contains no words of revocation affecting the gift in default of appointment. No doubt, if the gift in the codicil had taken effect, it would have superseded and to that extent would have impliedly revoked the gift in the will; but the implication of revocation is found only in the terms of the substituted trust, and if that trust falls to the ground the implied revocation falls with it." That is exactly applicable to the present case. Lord Dunedin said (1): "If when a subject has been disposed of in a will and the same subject is again disposed of, either in a subsequent will or in a codicil, then if you can find, apart from the description of the subject, words expressly or impliedly effecting revocation, that revocation will stand, whatever the fate of the subsequent disposition; but if the only revocation is that . . . . to be gathered from the inconsistency of the subsequent disposition with the earlier one, then if the second disposition fails from any reason to be efficacious there will be no revocation." That again applies to the present case, because the residuary legatees are faced with a devise of "all the farms" in Bedwas followed by a subsequent ineffectual disposition of Farm A in that parish.

I am really asked to read the codicil as a devise of Farm A and clause 8 as a devise of the rest of the farms in Bedwas. That is exactly what clause 8 does not say. It is a devise of all the farms in Bedwas. The codicil merely devises one farm there on trusts partially inoperative. To the extent that the codicil is effective, clause 8 is revoked but to that extent only, and I cannot see any ground for saying that Farm A, so far as not taken out of clause 8, does not pass by that clause.

There are many other authorities, with which I need not deal, the present will and codicil being exceptionally plain. I will therefore only mention one.

(1) [1924] A. C. 671.

ASTBURY J.
1927
DAVIES, *In re.* THOMAS *v.* THOMAS-DAVIES.

In *Doe* v. *Marchant* (1) a testatrix gave the ultimate remainder of all her lands in the events that happened to her granddaughter Betty Jones in fee. By a codicil "instead of" that devise she gave her a life interest, with remainders over that failed, but with no ultimate remainder in fee. It was held that the ultimate remainder in the will was unaffected by the codicil. Tindal C.J., delivering the judgment of the Court of Common Pleas, said: "But the codicil does not go on to dispose of the ultimate fee, in case the intermediate remainders should, as the fact has proved, never take effect. But, as this ultimate fee is given by the will to Betty Jones, it appears to us that such disposition of the fee in the will, being unaltered by the codicil, must still be considered as taking effect. The argument on the part of the plaintiff has been, that, inasmuch as the devise in the codicil is expressly given to Betty Jones 'instead of' the devise and bequest contained in the will, it must be considered as an express revocation of the former devise, and the substitution of that contained in the codicil. But we think the force of that word will be satisfied without giving it so large an operation; and that it may well be interpreted to mean 'instead of so much only of' the devise in the will as is incompatible with the disposition contained in the codicil. And this appears to us the sounder construction, as it is the manifest intention of the testatrix, both in the will and codicil, to make Betty Jones the principal object of her bounty."

In the present case clause 8 contains a clear and plain devise of "all my farms and lands" in Bedwas and so far as that devise is not altered by the codicil, the gift remains. The undisposed of interest in Farm A therefore passes under clause 8.

Solicitors: *Long & Gardiner, for C. Davies Jones, Bedwas, Mon.*; *Gibson & Weldon, for Trevor C. Griffiths, Blackwood, Mon.*; *Alfred Cox & Son, for Clarke & Nash, High Wycombe.*

(1) 6 Man. & G. 813, 826.

G. R. A.

GRAIGOLA MERTHYR COMPANY, LIMITED *v.* MAYOR, ALDERMEN AND BURGESSES OF SWANSEA.

TOMLIN J.

1926

Nov. 3, 4, 5, 8, 9, 10, 11, 12, 16, 17, 18, 19, 23, 24, 25, 26, 30; *Dec.* 1, 2, 3, 8, 9, 10, 14, 15, 16, 17, 20, 21.

1927

Jan. 12, 13, 14, 19, 20, 21, 26, 27, 28; *Feb.* 2, 3, 4; *March* 2, 3, 4, 9, 10, 11, 16, 17, 18, 23, 24, 25, 30, 31; *April* 1, 6, 7, 8; *May* 31; *July* 29.

[1920. G. 2270.]

Waterworks—Reservoir over Mine—Anticipated Danger of Flooding—Quia timet Action to prevent Filling—Sustainable Action—Costs—"Solicitor and client"—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *ss.* 6, 27—*Waterworks Clauses Act*, 1863 (26 & 27 *Vict. c.* 93), *s.* 3—*Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

The Waterworks Clauses Act, 1847, s. 27, provides that: "Nothing in this or the special Act shall prevent the undertakers from being liable to any action or other legal proceeding to which they would have been liable for any damage or injury done or occasioned to any mines by means or in consequence of the waterworks in case the same had not been constructed or maintained by virtue of this Act or the special Act":—

Held, that the section left the undertakers liable to all legal proceedings which before the Act were open to mineowners for protection from damage or injury arising from the works, whether actual or threatened; so that the action in this case was sustainable, although it was a quia timet action brought by mineowners for an injunction to restrain the defendants from filling a reservoir constructed and maintained by virtue of a special Act and the Act of 1847 on the ground that, if filled, the mine would be flooded.

In preparing for hearing cases of complexity involving expert evidence all concerned should address their minds to restricting the area of dispute; and the expert advisers of the parties, whether legal or scientific, are under a special duty to the Court in preparing such a case to limit in every possible way the contentious matters of fact to be dealt with at the hearing.

The Public Authorities Protection Act, 1893, s. 1, applies to an action brought quia timet to prevent a person from doing any act "in pursuance, or execution or intended execution of any Act of Parliament or of any public duty or authority," and the successful defendant in such an action is entitled to any costs awarded him "as between solicitor and client."

Harrop v. *Mayor of Ossett* [1898] 1 Ch. 525 and *Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works* [1898] 2 Ch. 603 followed.

Semble, that even if this were not so, a letter threatening to do the act might be a sufficient "act" within the meaning of this section. *Grand Junction Waterworks Co.* v. *Hampton Urban Council* [1898] 2 Ch. 331 and *Holford* v. *Acton Urban Council* [1898] 2 Ch. 240 considered.

WITNESS ACTION.

The defendants constructed a reservoir, known as the Blaennantddu Reservoir, under the Swansea Waterworks

TOMLIN J. 1927 GRAIGOLA MERTHYR CO. v. SWANSEA CORPORATION.

Act, 1860, with which was incorporated the material parts of the Waterworks Clauses Act, 1847, and the Swansea Waterworks Act, 1873, which incorporated the Waterworks Clauses Act, 1863. The reservoir was completed and filled in 1879, and remained filled and in use until 1911.

The plaintiffs owned two collieries, called Graig Merthyr and Clydach Merthyr respectively, of which the workings had joined, so that they were being worked as one colliery. The seam worked was the Graigola seam. Early in 1906 the plaintiffs' workings had reached a point near the defendants' boundaries, and they became desirous of working the seam under the reservoir in case the defendants decided not to acquire the minerals. Negotiations ensued, which extended over some years, and ultimately an agreement was come to dated September 23, 1912. The agreement provided by clause 1: "The company shall be at liberty to work and get all or any of the minerals (in the Graigola Seam and the fireclay associated therewith) underlying the reservoir and the buildings and underground pipes and works belonging thereto and within 40 yards therefrom and whether belonging to them as freeholders or lessees and shall unless prevented by strikes lockouts or other inevitable cause or accident so far as reasonably practicable work and get the said minerals in accordance with the ordinary custom of working and getting minerals in the district within two years from the 23rd day of September 1912 or if that shall prove to be impracticable then as soon as reasonably practicable thereafter." Clause 2: "The Corporation shall in order to permit of the settlement of the overlying strata keep the reservoir empty and shall wholly discontinue the use thereof as a reservoir for storage purposes for a period of three years computed from the date at which the Company shall have completely worked and gotten the said minerals in manner and as provided as aforesaid." Clause 3: "Nothing herein contained shall prejudice or affect the rights of the respective parties whatever they may be at the expiration of the said period of three years." The reservoir had in fact been emptied in July, 1911, though the plaintiffs were not aware

until the trial that it was emptied before the agreement was signed.

The plaintiffs after the execution of the agreement began to work the minerals under the reservoir and within forty yards therefrom. Some delay occurred in the working, and it was not until January, 1917, that the plaintiffs informed the defendants that the minerals were completely worked out. It was then agreed that the period of three years mentioned in clause 2 of the agreement should run from February 1, 1917. Accordingly nothing further was done until after February 1, 1920. The defendants then wrote expressing their intention of refilling the reservoir. The plaintiffs protested, alleging that the refilling would necessarily involve the flooding of their mines, and as the defendants adhered to their intention, the action was begun on October 26, 1920, asking for an injunction to restrain the defendants from letting water into the reservoir so as to cause damage to the collieries and mines of the plaintiffs under and adjacent to the reservoir.

The only matters calling for report are: (1.) the question whether a quia timet action of this nature will lie having regard to the Waterworks Clauses Act, 1847, ss. 6 and 27; and (2.) remarks made by Tomlin J. in regard to steps that should be taken to prevent action of this character being too protracted.

The hearing of this action lasted for sixty days.

Upjohn K.C., *J. G. Wood* and *A. T. James* for the plaintiffs.

Sir Leslie Scott K.C., *Valentine Holmes* and *T. Jenkin Jones* for the defendants. This action is not maintainable, having regard to the provisions of the Waterworks Clauses Act, 1847. Under the special Acts of the corporation and the Act of 1847 no action is maintainable except by mineowners for injuriously affecting land, provision being made for compensation instead, as in the Waterworks Clauses Act, 1847, s. 6. The owners of mines are put in a favoured position by s. 27, which provides that nothing in that Act or the special Act shall prevent the undertakers from being liable to any

TOMLIN J. 1927 GRAIGOLA MERTHYR CO. v. SWANSEA CORPORATION.

action or other legal proceeding to which they would have been liable "for any damage or injury done or occasioned to any mines by means or in consequence of the waterworks." Apart from s. 27 the rule in *Rylands* v. *Fletcher* (1) did not apply: compare *Dunn* v. *Birmingham Canal Navigation Co.* (2) The only right conferred on mineowners is to sue for "any damage or injury" done or occasioned. The position under the Waterworks Clauses Acts is very different from that under the Railways Clauses Acts: *Fletcher* v. *Birkenhead Corporation.* (3) The effect of the Waterworks Clauses Acts is that the ordinary person has one remedy only—namely, that of obtaining compensation under the Acts—but that under s. 27 a special right to damages for injury caused is given to mineowners. That section does no more than to save to mineowners their common law right to sue for damages. It does not entitle them therefore to any remedy by injunction in a quia timet action.

[TOMLIN J. Is not the correct view that the section preserves to mineowners all the rights of action they would have had apart from the Act?]

No, rights are not reserved to them in such wide terms. It might be thought that the construction put upon the Chancery Procedure Amendment Act, 1858, s. 2, in *Leeds Industrial Co-operative Society* v. *Slack* (4), assisted the plaintiffs here; but the observations of Lord Sumner in his dissenting judgment apply to this case with greater force. The words "for any damage or injury done or occasioned" are incapable of applying to an action quia timet before any damage or injury has been caused.

[TOMLIN J. As s. 27 of the Waterworks Clauses Act, 1847, was keeping alive existing rights, it may well receive a broad construction.]

Sect. 27 is an exception to the general provision depriving persons of any right except to compensation, and as an exception it should be construed strictly.

(1) (1868) L. R. 3 H. L. 330. L. R. 8 Q. B. 42.
(2) (1872) L. R. 7 Q. B. 244; (3) [1906] 1 Q. B. 605, 611.
(4) [1924] A. C. 851, 868.

Again, protection from danger caused by a reservoir being in a defective condition is conferred by the Waterworks Clauses Act, 1863, ss. 3, 4, 5. That would have been unnecessary if an action quia timet would lie. On the defendants' view of the construction of s. 27 of the Act of 1847 this later Act fills up any gap so caused so far as Parliament thought necessary.

Upjohn K.C. in reply. The defendants as waterworks undertakers are liable to any action in respect of the matters alleged by the plaintiffs as mineowners, including quia timet proceedings. The whole scheme of the Act is to leave waterworks undertakers in their common law position in relation to mineowners. The mineowners can work under the reservoirs and buildings of the undertakers, unless the latter take over the minerals: s. 22. If they work and suffer damage they can proceed under s. 27. But they do not have to wait until damage has occurred. If, as the plaintiffs' case is, the reservoir could not be filled without working mischief, the moment the defendants gave notice of their intention to fill, there was a beginning of injury: *Earl of Ripon* v. *Hobart*. (1) In that sense this is a legal proceeding in respect of damage or injury done or occasioned. Therefore the defendants are, on a true view of the Waterworks Clauses Act, 1847, s. 27, relegated in relation to mineowners to their common law position and subject to the doctrine of *Rylands* v. *Fletcher*. (2) It follows that if the evidence reaches the proper standard to justify quia timet proceedings, the Court will be free to grant an injunction against them.

Cur. adv. vult.

1927. May 31. TOMLIN J. This is an action in which a colliery company seeks an injunction in effect to restrain the Swansea Corporation from filling a certain reservoir known as the Blaennantddu Reservoir, so as to cause damage to the collieries and mines of the plaintiffs under and adjacent to the reservoir. The reservoir is empty, and has stood

(1) (1834) 3 Myl. & K. 169, 176. (2) L. R. 3 H. L. 330.

TOMLIN J.
1927
GRAIGOLA MERTHYR CO. v. SWANSEA CORPORATION.

empty for some years. The plaintiffs' case is that the filling of the reservoir will result in their mines being flooded by a sudden inundation. The action is therefore a quia timet action, and nothing else. [His Lordship then stated the facts including a number of facts not material for the purpose of this limited report and continued:] Before I deal with the substance of the action it will be convenient to dispose of one point in the nature of a preliminary objection made by the defendants. They say that having regard to the provisions of the Waterworks Clauses Act, 1847, incorporated with the Acts under which the reservoir was constructed, the action will not lie. Sect. 6 of the Waterworks Clauses Act, 1847, provides that the undertakers "shall make to the owners and occupiers of and all other parties interested in any lands or streams taken or used for the purposes of the special Act, or injuriously affected by the construction or maintenance of the works thereby authorized, or otherwise by the execution of the powers thereby conferred, full compensation" to be ascertained under the Act "for the lands and streams so taken or used," and "for all damage sustained by such owners, occupiers and other persons." This section goes further than the corresponding provision in the Railways Clauses Act, 1845, as it provides for cases of injurious affection by reason of the maintenance as well as by reason of the construction of the works: see *Fletcher* v. *Birkenhead Corporation*. (1) Then s. 27 of the Waterworks Clauses Act, 1847, enacts as follows: "Nothing in this or the special Act shall prevent the undertakers from being liable to any action or other legal proceeding to which they would have been liable for any damage or injury done or occasioned to any mines by means or in consequence of the waterworks in case the same had not been constructed or maintained by virtue of this Act or the special Act." The Waterworks Clauses Act, 1863, by s. 3 enacted: "Whenever any person interested complains to two justices that any reservoir constructed by the undertakers

(1) [1906] 1 K. B. 605; [1907] 1 K. B. 205.

is in a dangerous state such justices shall forthwith make enquiry into the truth of the complaint," and the Act then confers on the justices power to make orders for the lowering of the water and the execution of requisite works. The defendants say: First, that under the Act of 1847 (except so far as this result is excluded by s. 27) the remedy of any person injuriously affected by the construction or maintenance of the works is taken away, and he is left to compensation under s. 6; secondly, that under s. 27 mine-owners are put in a favoured position to this extent, that they can sue for damages for injury actually suffered, but where no injury has actually happened they have no remedy by way of a quia timet action; and thirdly, while admitting that the Act of 1847 on this view contains no provision for dealing with threatened injury to a mine, they say this omission was made good by s. 3 of the Act of 1863. Sect. 27 is one which preserves the liability of the undertakers in respect of damage or injury to mines. I think it would be a narrow and unreasonable construction of the section to say, and I do not think that I am driven by the language employed to say, that the section does nothing more than save the mineowner's common law action for damages. In my judgment it leaves the undertakers liable to all legal proceedings which before the Act were open to the mineowner for protection against damage or injury arising from the works, whether actual or threatened. I cannot think that under the Act of 1847 the mineowner was bound to wait until the blow, however inevitable or disastrous, had actually fallen before he was entitled to move. The construction which I prefer and adopt fits in, I think, with the earlier ss. 18 to 26 of this Act, the meaning of which was explained by Fry L.J. in *In re Holliday & Wakefield Corporation's Arbitration*. (1)

The preliminary point, therefore, in my opinion, fails. [His Lordship then proceeded to deal with the evidence, and after coming to the conclusion that the action failed continued:] There is one other matter to which this case

(1) (1888) 20 Q. B. D. 699, 716, 717; [1891] A. C. 81, 93.

TOMLIN J.
1927
GRAIGOLA MERTHYR CO. v. SWANSEA CORPORATION.

has directed attention and upon which I wish to add a word. Of late years cases involving expert evidence appear to have increased in number and in length. Having regard to the complexity of modern life and the widened field over which science ranges, this is perhaps inevitable, but the overloading of these cases in the preparation of them is becoming not infrequent. Long cases produce evils; they place the parties with the lesser resources at a grave disadvantage, and they delay the course of the general business of the Courts and thereby inflict serious hardship on other litigants. In every case of this kind there are generally many "irreducible and stubborn facts" upon which agreement between experts should be possible, and in my judgment the expert advisers of the parties, whether legal or scientific, are under a special duty to the Court in the preparation of such a case to limit in every possible way the contentious matters of fact to be dealt with at the hearing. That is a duty which exists notwithstanding that it may not always be easy to discharge. If it should prove not to be generally appreciated or properly discharged, it may become a matter for consideration whether some change in the method of trial should not be made. The present case was begun in 1920. For six years materials were amassed. Experts on both sides paid numerous visits to the locus in quo, both underground and on the surface, but the experts never met on the spot to see whether, as to physical appearances in the mine or on the surface, they could not reach a measure of accord, nor was any other step taken to reduce the issues open at the trial. In consequence this case had become unmanageable before the trial began, and notwithstanding efforts by counsel on both sides during the trial to shorten matters, many days were occupied in hearing evidence on points with regard to which there ought not to have been any difference, with the result that the trial, in my judgment, lasted too long. I think that all concerned in litigation of this class must in future in the preparation of their cases more closely address their minds to restricting the area of dispute. I am not able to affect costs in this action by these considerations, because I have

not thought it right to occupy further public time by inquiring how the responsibility for what has occurred should be distributed.

[His Lordship then made an order dismissing the action and ordering the plaintiffs to pay two-thirds of the defendants' costs of the action.]

July 29. The minutes of the order as prepared by the registrar directed payment of two-thirds of the defendants' costs as between solicitor and client on the ground that the Public Authorities Protection Act, 1893, s. 1 (1), applied, and the plaintiffs moved to vary the minutes as settled by omitting the words "as between solicitor and client."

Upjohn K.C. and *A. T. James* for the plaintiffs. The case does not fall within the Public Authorities Protection Act, 1893, s. 1. If the act of filling the reservoir had been done and water had come through into the mine, the Act would have applied to an action brought for damages, because the damages would be claimed in respect of an act done by the defendant corporation under statutory powers: *Jeremiah Ambler & Sons, Ld.* v. *Bradford Corporation* (2); *Fielding* v. *Morley Corporation.* (3) The Act does not, however, apply to a quia timet action. The very title of the Act indicates this. It is "an Act to generalize and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties." Further, s. 1, which

(1) Sect. 1 is as follows: "Where after the commencement of this Act any action, prosecution or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect:—

"(*a*) The action, prosecution or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof;

"(*b*) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client. . . . . "

(2) [1902] 2 Ch. 585.

(3) [1899] 1 Ch. 1.

TOMLIN J.
1927
GRAIGOLA MERTHYR CO. v. SWANSEA CORPORATION.

gives the successful defendant solicitor and client's costs, relates to "any action, prosecution or other proceeding . . . . for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty or authority." There must be an act done by the public authority, and this is confirmed by the language in the same section of the subsequent provision, that "the action . . . . shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of." The question whether the section applies to a quia timet action has however been considered in *Harrop* v. *Mayor of Ossett* (1), and answered in the affirmative; but then the argument turned not on the meaning of the words "act done" but on the meaning of the word "action," and the decision really was that "action" is wide enough to include all actions in the Chancery Division, including actions for injunctions: see also *Toms* v. *Clacton Urban Council* (2), but it is not clear in that case whether the action was merely quia timet. So too in *Grand Junction Waterworks Co.* v. *Hampton Urban Council* (3) it is not clear whether the action was brought quia timet or not. In that case the defendants gave the plaintiffs notice that they were committing an offence under the Public Health (Buildings in Streets) Act, 1888, and required its discontinuance, and that notice was an act done.

[TOMLIN J. Might not the letter sent in the present case by the defendants to the plaintiffs announcing their intention of filling the reservoir be an act bringing the case within the section?]

In *Grand Junction Waterworks Co.* v. *Hampton Urban Council* (3) the notice was a step in the proceeding. A local authority first gives the notice and then proves that the offence has been continued in spite of it. In any case

(1) [1898] 1 Ch. 525.
(2) (1898) 62 J. P. 505; 46 W. R. 629.
(3) [1898] 2 Ch. 331, and on the question of costs (1899) 63 J. P. 503.

it could not be said that the letter of the defendants in this case was an act done so that no proceedings could be commenced more than six months afterwards. It is submitted therefore that the direction in the minutes is wrong.

Sir Leslie Scott K.C. and *Valentine Holmes* for the defendants. A quia timet action falls within the Public Authorities Protection Act, 1893: *Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works* (1); *Holford* v. *Acton Urban Council* (2); *Harrop* v. *Mayor of Ossett.* (3)

[TOMLIN J. In the latter case the defendants had obtained the sanction of the Local Government Board to the erection of a fire engine station on the land in question; that might be a sufficient act within the section.]

Not more so surely than the letter from the Swansea Corporation in the present case announcing their intention of filling the reservoir. It is submitted that both these authorities were cases of quia timet action, and the first of the cases was a decision of the Court of Appeal. Apart from authority, it is submitted that "act done" means in the section an act done or to be done. Stress has been laid on the provision in the section that proceedings must be brought within six months after "the act, neglect or default complained of," but that provision does not cover the whole ground of the body of the section.

Upjohn K.C. in reply. On the construction of the section there is no justification on the language for the contention that the provision limiting the time within which actions may be brought does not cover the whole ground of the body of the section.

In *Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works* (1) there was no argument and no reasoned judgment, and in the *Holford* case (2) something had been done which prevented its being a quia timet action.

[TOMLIN J. It seems quite plain that in none of the cases cited is there any reported argument or reasoned judgment addressed to the particular point.]

(1) [1898] 2 Ch. 603, 608. (2) [1898] 2 Ch. 240, 249.
(3) [1898] 1 Ch. 525.

TOMLIN J. 1927 GRAIGOLA MERTHYR CO. v. SWANSEA CORPORATION.

In those circumstances the Court is free in the matter and not bound by any authority. The only decision of the Court of Appeal is in the *Southwark* case (1), and it is submitted that this is not binding on the Court in the absence of any argument or reason.

TOMLIN J. This is an application to vary the minutes in these circumstances. The action was brought by the plaintiffs to restrain the Corporation of Swansea, who were statutory undertakers under certain Waterworks Acts of a considerable undertaking for the supply of water to the Borough of Swansea, from filling a certain reservoir on the ground that the reservoir, if filled, would cause an inundation of the plaintiffs' mine. The action was based upon the threat of the defendants, which is pleaded in the statement of claim, to proceed with the filling of the reservoir. The action afterwards came on for trial, and the plaintiffs at the trial failed to establish that imminent catastrophe which was necessary to enable them to succeed. The result was that the action was dismissed, and an order was made for payment of a certain part of the costs of the action by the defendants. When I dealt with the action at the trial I said that the matter as to the Public Authorities Protection Act, 1893, would be dealt with in the ordinary way, and that the parties would have whatever were their rights in regard to it. It appears that the minutes as drawn provide for the taxation of the defendants' costs as between solicitor and client. This application is to vary the minutes by omitting the words "as between solicitor and client," on the ground that the action is not an action within the purview of the Public Authorities Protection Act, 1893.

Mr. Upjohn has called my attention to the provisions of the Act, and upon those provisions has founded an argument which, I think, may be stated in this way, that the Act only applies where an action is launched against a person for an act or a neglect actually completed, and that it has no application to an action which is in its nature purely quia

(1) [1898] 2 Ch. 603, 608.

timet. For example, if the defendants had filled their reservoir and an action had then been commenced against them by the plaintiffs, it would have been clearly within the Act. But Mr. Upjohn says if they take precautionary proceedings by way of quia timet to prevent the filling of the reservoir, then those proceedings are not within the language of s. 1 on its true construction.

As Romer J. said in *Jeremiah Ambler & Sons, Ld.* v. *Bradford Corporation* (1), the Court is not concerned with the policy of the legislature in passing the Public Authorities Protection Act, and ought not to approach any question as to the application of the Act to a particular case with any feeling that it is desirable that the provisions of the Act should, if possible, either be enlarged or be curtailed in their application. The Court is only concerned with the proper construction of the Act. I may say at once that quite apart from any view I may have of my own upon the construction of this Act, I feel it is impossible at this stage, having regard to the cases which are reported, to hold that the Act does not apply to an action of this sort. There are a number of cases in the books, to which my attention has been called, some of which are clearly quia timet actions and the nature of some of which is more doubtful. In particular, there are two cases, *Harrop* v. *Mayor of Ossett* (2) and *Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works* (3), where the actions were plainly quia timet actions. It is quite true that there is no report in either case of any argument addressed to this particular point nor any reasoned judgment addressed to this particular point, but in fact the actions did result in solicitor and client costs being given to the defendants. The second of these actions was before the Court of Appeal, and in those circumstances, having regard to the fact that one is a decision by a judge of co-ordinate jurisdiction and the other a decision by the Court of Appeal, and that they are decisions now of some thirty years' standing, I do not think it would be right for

(1) [1902] 2 Ch. 585. (2) [1898] 1 Ch. 525.
(3) [1898] 2 Ch. 603.

TOMLIN J. 1927 GRAIGOLA MERTHYR CO. v. SWANSEA CORPORATION.

me to put any other construction upon the section. If the section ought to bear some other construction, I think at this date it must be for a higher Court to determine it.

There is another observation which I desire to make—namely, that even if Mr. Upjohn is right in his argument on construction, this case may still fall within the Act. There are two cases, *Grand Junction Waterworks Co.* v. *Hampton Urban Council* (1) and *Holford* v. *Acton Urban Council* (2), where it may be said that the actions were not quia timet because there had been on the part of the defendants some notice or threat which could be treated as an act within the meaning of the section. I think those two cases must either be treated as quia timet actions in which solicitor and client costs were granted, or else as actions which were not quia timet only because there was in each case an act done within the meaning of the section; and if the latter view be the correct one I see great difficulty in distinguishing the present case, where there was a letter threatening the filling of the reservoir, from those two cases. I think, therefore, I must further come to the conclusion that in accordance with those two cases there was a sufficient act here to bring the case within the section.

I do not know whether, after arriving at that conclusion and feeling it impossible to do otherwise than make an order in accordance with the earlier decisions, I can usefully discuss the meaning of the section. But perhaps I ought to say, that notwithstanding the argument which Mr. Upjohn has addressed to me, I cannot help thinking that sub-s. (*a*) of the section has reference really only to those cases where there is a final completed act, and that there may well be an act within the first part of the section which is at once sufficient for bringing the case within the section, and is so incomplete an act as prevents time from running under sub-s. (*a*); in other words, if a man threatens to fill a reservoir, that may be an act which brings an action to prevent it within the section, and yet may also be something which is not complete so long as the threat stands alone so as to bring

(1) [1898] 2 Ch. 331. (2) [1898] 2 Ch. 240.

into operation sub-s. (*a*). The judgment must be drawn up including the words "as between solicitor and client." The costs of this application must be part of the costs in the action, and the order had better be postdated.

TOMLIN J.
1927
GRAIGOLA MERTHYR CO. *v.* SWANSEA CORPORATION.

Solicitors: *Beamish, Hanson, Airy & Co., for Gwilym James, Llewellyn & Co., Merthyr; Peter Thomas & Clark, for H. L. Lang-Coath, Swansea.*

H. C. G.

In re FEGAN.

FEGAN *v.* FEGAN.

TOMLIN J.
1927
Oct. 14, 18.

[1927. F. 860.]

Will—Gift of Legacies out of personalty Fund—Fund subject to Mortgages—Direction for Payment of Debts out of Proceeds for freehold and leasehold Property and Chattels—Expression of "contrary or other intention"—Special Fund for Payment of Debts insufficient—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 35.

The provision by a testator in his will of a special fund (not being any of the funds mentioned in the Administration of Estates Act, 1925, s. 35, sub-s. 2) for payment of his debts operates as the expression of a "contrary or other intention" within the meaning of the section so as to exonerate (as between the different persons claiming through the testator) a personalty fund which at the testator's death was subject to a mortgage from the primary liability to discharge it; but the fund is only exonerated to the extent that the special fund is available for discharging the mortgage debt, and in so far as it is inadequate the mortgaged property remains primarily liable.

In re Birch [1909] 1 Ch. 787 applied.

ADJOURNED SUMMONS.

By his will dated January 24, 1924, Richard Fegan devised and bequeathed his freehold property known as 111 Mayow Road, Sydenham, his freehold land situated at Coombe Hill, East Grinstead, his leasehold property known as 24 St. John's Park, Blackheath, and his furniture, plate,

TOMLIN J. 1927 FEGAN, *In re.* FEGAN *v.* FEGAN.

plated articles, linen, china, glass, pictures, prints and other household effects (after his daughters Ethel Sophia Fegan and Adeline Constance Gladys Fegan had selected what they wanted) upon trust that his trustees should sell, call in and convert the same into money and out of the money produced thereby and out of his ready money pay his funeral and testamentary expenses and debts. Then after bequeathing an annuity and making certain specific devises and bequests the testator bequeathed to his daughters in equal shares the money payable at his death under his three life policies in the Law Life Office, the Phœnix Assurance Company and the British Equitable Assurance Company absolutely; and after making certain further bequests, the testator directed his trustees to invest the residue of his real and personal estate in any security they might be advised and to hold the same upon the trusts therein mentioned.

By a codicil to his will dated September 3, 1924, the testator revoked the above bequests of his policy money to his daughters and in lieu thereof bequeathed to each of his daughters out of the proceeds of the said life policies the sum of 1000*l.* absolutely, and gave the balance of the proceeds upon the trusts in favour of his son Clifford Pease Fegan therein mentioned.

The testator died on February 9, 1927, leaving three sons and four daughters. The policy in the Law Life Office had been taken over by the Phœnix Assurance Company on an amalgamation during the testator's lifetime, and at his death he was entitled to a policy for 250*l.* in the British Equitable Assurance Company and three policies for 800*l.*, 500*l.* and 2000*l.* respectively in the Phœnix Assurance Company. These policies with bonuses had at the testator's death the total value of 5599*l.* 7*s.* 5*d.* The testator had however mortgaged the policies to the respective issuing companies to secure sums amounting in the whole to 2002*l.*

This summons was taken out by one of the two executors asking (inter alia) whether on the true construction of the testator's will and codicil each of his four daughters was entitled to a full legacy of 1000*l.* or only to such less sum as might arise

from the policies, and in the latter case whether under s. 35 of the Administration of Estates Act, 1925, the mortgages on these policies must be first paid out of the proceeds thereof.

On the first part of this question Tomlin J. decided that as matter of construction the legacies were specific and not demonstrative, so that they were only payable out of the proceeds of the policies.

The case only falls to be reported on the question whether the Administration of Estates Act, 1925, s. 35, was applicable.

Bradley Dyne (*Sir A. Underhill* with him) for the summons.

Eardley-Wilmot for the four daughters of the testator. There is here a contrary intention shown so as to make the Administration of Estates Act, 1925, s. 35, inapplicable because a special fund, not being one of the particular funds specified in sub-s. 2, has been provided for payment of debts.

Freeman for two sons of the testator. The Administration of Estates Act, s. 35, applies in this case, and the mortgages of the policies cannot be paid for out of the policy money. This section has assimilated the position in regard to charges on personalty to that affecting charges on realty under Locke-King's Act. Sub-section 2 provides that a contrary or other intention excluding the operation of the section is not to be taken as signified "by a general direction for the payment of debts or of all the debts of the testator out of his personal estate, or his residuary real and personal estate, or his residuary real estate." The inference is that there must be something more than the provision of funds for the payment of debts and "words expressly or by necessary implication referring to all or some part of the charge."

[TOMLIN J. The special fund provided for payment of debts is not one of those mentioned in sub-s. 2. Why then should its provision not operate as the expression of a contrary intention?]

It is submitted that sub-s. 2 is intended to prevent any mere direction for payment of debts out of a particular fund operating to express a contrary intention.

TOMLIN J.
1927
FEGAN, *In re.* FEGAN *v.* FEGAN.

R. R. Formoy for the grandchildren of the testator adopted the argument on behalf of the testator's sons, and contended that s. 35 was only a provision in aid of the residuary estate.

TOMLIN J. By his will the testator in clause 3 devised and bequeathed certain freehold and leasehold property and chattels upon trust that the trustees should sell, call in and convert the same and out of the proceeds pay his funeral and testamentary expenses and debts, and he seems thereby to have constituted a primary fund for the payment of debts. Then by clause 8 he bequeathed to his daughters his life policies in three companies. Finally in clause 10 he deals with his residue, and leaves it upon trusts which it is unnecessary to state. By a codicil to his will he revoked the bequest of the life policies, and in lieu thereof bequeathed 1000*l.* to each daughter out of the proceeds of the life policies, and directed his trustees to hold the balance of the policy money upon trusts in favour of his son Clifford.

The policies in question were worth between five and six thousand pounds at the testator's death, but they were subject to mortgages of substantial amounts which have reduced the policy money considerably below the amount required to pay the four legacies of 1000*l.* each; and the first question raised by the summons is whether these legacies are specific or demonstrative. [His Lordship then decided that on the true construction of the will and codicil they were specific.] The further question then arose whether, having regard to the Administration of Estates Act, 1925, s. 35, the mortgages on the policies must be borne by the proceeds of the policies, or whether, having regard to the provisions of the will, a contrary intention had been expressed sufficient to exclude the operation of the section.

Sect. 35 provides by sub-s. 1 that "where a person dies possessed of, or entitled to, ... an interest in property, which at the time of his death is charged with payment of money, whether by way of legal mortgage, equitable charge or otherwise (including a lien for unpaid purchase money), and the deceased has not by will deed or other document signified

a contrary or other intention, the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for the payment of the charge; . . . ." By sub-s. 2 " such contrary or other intention shall not be deemed to be signified—(*a*) by a general direction for the payment of debts or of all the debts of the testator out of his personal estate, or his residuary real and personal estate, or his residuary real estate; or (*b*) by a charge of debts upon any such estate; unless such intention is further signified by words expressly or by necessary implication referring to all or some part of the charge."

Under clause 2 of the will there is a disposition under which the testator constitutes a specific fund consisting of freehold and leasehold property, chattels and some ready money as a fund for payment of his debts. He directs his trustee to " sell call in and convert the same into money and out of the moneys provided by such sale calling in and conversion and with and out of my ready money pay my funeral and testamentary expenses and debts." That fund is not one of the funds mentioned in s. 35, sub-s. 2. It is not a direction for payment of debts out of personal estate, or residuary real and personal estate, or residuary real estate. It is a direction for the payment of debts out of a fund to be constituted by the sale of specific property, consisting of freehold or leasehold property and chattels. That being so, the question is whether, apart from sub-s. 2, which does not apply in this particular case, there is a " contrary or other intention " expressed. It is difficult in the extreme to say that, if the testator has constituted a particular fund for payment of debts, he did not so intend, but meant the particular debt in question to be paid out of some other property. It seems to me that when once a testator directs payment of debts out of a specific fund, he has signified a contrary or other intention in respect of any debt which would otherwise be payable out of another fund.

Therefore I hold that a contrary intention has been expressed within the meaning of the section, and that the mortgages on the policies must primarily be borne by the fund created

BIBL. LONDIN UNIV.

TOMLIN J. 1927 FEGAN, *In re.* FEGAN *v.* FEGAN.

by clause 2. If that fund should prove inadequate, a question may arise whether the balance not provided for ought not to be discharged out of the fund which but for clause 2 of the will would have had to bear it.

October 18. It subsequently appeared that the fund created by clause 2 of the will was quite inadequate for the payment of the mortgages on the policies, and the question how the balance of the mortgage debts should be borne was then argued.

Eardley-Wilmot for the four daughters. The question of the effect of the provision of an inadequate fund for payment of a mortgage debt in exoneration of the property charged has been considered in a case under the Real Estate Charges Act, 1854, s. 1, and it was held that this did not indicate a general contrary intention so as to enable the devisee of the mortgaged property to come on the residuary personalty for any deficiency: *In re Birch.* (1) The section of Locke-King's Act there in question is however distinguishable from the Administration of Estates Act, 1925, s. 35. Under Locke-King's Act the mortgaged fund could not obtain complete exoneration in such a case as this, unless an intention had been expressed not only that the mortgaged property should not be primarily liable, but also that the mortgage debt was to be satisfied out of the general personal estate. That is not so under s. 35 of the Act of 1925. When once an intention has been expressed that the mortgaged property is not to be primarily liable by making some other fund primarily liable, a contrary intention has been expressed which excludes the operation of the section.

Freeman for the two sons. This case is completely covered by *In re Birch.* (1) Sect. 35 is ousted only tothe extent that the fund made primarily liable is available. The mortgaged fund remains primarily liable in respect to the balance.

R. R. Formoy for the grandchildren. There is no material distinction between the two sections, and *In re Birch* (1) applies.

(1) [1909] 1 Ch. 787.

TOMLIN J. The question which I have to determine depends upon the construction of s. 35 of the Administration of Estates Act, 1925, and the language of the testator's will. Under his will he has provided a special fund for the payment of debts, and he has also given to certain legatees interests in the money arising from certain policies which were mortgaged by him. The special fund is insufficient to satisfy the debts in full, and the short point is whether the unsatisfied balance of the sum charged on the policy moneys is payable out of residue. On the one hand it is contended that this is so and that s. 35 does not apply, but on the other it is said that the section applies and that the provision of a special fund expressed a contrary or other intention so far only as money was available from the special fund to pay the debts. I have little doubt that although the language of the section is not precisely the same its object was to place personal estate on the same footing as that on which real estate stood having regard to Locke-King's Act. The Act of 1854, s. 1, provides that "When any person shall . . . . die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged. . . . ." A question arose under that Act in *In re Birch* (1) where a testator directed that a mortgage debt secured on Whiteacre was to be paid out of the proceeds of sale of Blackacre, and it was held that the direction exonerated Whiteacre to the extent of those proceeds, but did not indicate a general

TOMLIN J.
1927
FEGAN, *In re.* FEGAN *v.* FEGAN.

(1) [1909] 1 Ch. 787, 789.

TOMLIN J. 1927 FEGAN, *In re.* FEGAN *v.* FEGAN.

" contrary or other intention " within the Real Estate Charges Act, 1854, s. 1, so as to enable the devisees of Whiteacre to come on the general personal estate for any deficiency.

Swinfen Eady J. said: " The true construction of that section is that the devisee of land so charged takes the land subject to the payment of the mortgage debt except so far as a contrary or other intention is shewn, and it is only so far as a contrary or other intention is shewn that the land is to be exonerated." He then referred to earlier cases in which there had been some conflict, and said: " I am not satisfied that Romilly M.R. meant to express any opinion in favour of the devisee's right to general exoneration in such a case; but I adopt the opinion of Sir R. Kindersley, which appears to me to be the true view, namely, to give effect to the contrary intention so far as shewn by the will and no further. In the present case the only intention is to exonerate Whiteacre to the extent of the proceeds of Blackacre, and I can find no indication of any intention that Whiteacre is to be exonerated also out of the general personal estate."

Unless there is some difference between the language of s. 1 of Locke-King's Act, 1854, and s. 35 of Administration of Estates Act, 1925, the language of Swinfen Eady J. seems to me to apply to the present case. The testator has indicated that a particular fund should be used for paying debts. That seems to me to be a direction that the mortgage debt is to be paid out of that fund so far as it is available, but not a direction that the property charged is to be exonerated beyond that so as to throw the burden of the balance of the sum charged on the general personal estate.

Mr. Eardley-Wilmot suggests that there is a distinction in language between the two sections and that although under s. 35 the mortgaged property is made primarily liable for the mortgage debt in the absence of an expression of a contrary intention, yet if another fund is made primarily liable, that expresses a sufficient contrary intention to free the mortgaged property from the burden of the debt.

Although the language of the two sections differs somewhat, I think the effect is precisely the same, and that each section

provides that the mortgaged property is to be primarily liable unless a contrary intention is expressed, but that if the intention expressed is that some other fund is to be primarily liable, it only expresses a contrary or other intention to the extent that this other fund is to be primarily liable so far as its size permits, and that in other respects no alteration is made in the order in which the debts are to be paid. If the special fund is insufficient, there is nothing to throw the balance of the mortgage debt on the general personal estate.

Therefore I will declare that in so far as the special fund is insufficient for payment of debts the money charged will remain payable primarily out of the fund charged.

Solicitor: *W. G. A. Edwards.*

H. C. G.

FIRST GARDEN CITY, LIMITED *v.* BONHAM-CARTER.

[1927. F. 725.]

Company—Ordinary Shares—Limited cumulative Dividend—Arrears—Fund for Payment in Part—Mode of Distribution.

The memorandum of association of the above company, which was incorporated in 1903, provided for the payment on the ordinary shares of the company of a cumulative dividend not exceeding 5 per cent. per annum and for any balance of profits being applied for the benefit of the garden city or its inhabitants. Art. 129 of the articles of association provided that subject to the rights of holders of debentures and preference shares the net profits of the company, after providing for a reserve fund and for depreciation, "shall be divided by way of dividend among the members in proportion to the amount paid on the ordinary shares held by them respectively, but so that the dividends upon the ordinary shares for any year shall not exceed the aggregate rate of 5 per centum per annum. The surplus of the net profits of the company after payment of such dividends and the amount necessary to make up dividends for past years to the rate of 5 per centum per annum shall be applied" for the benefit of the town or its inhabitants as therein mentioned.

The company from time to time over a number of years issued ordinary shares. From 1904 to 1917 no dividend was paid on the

TOMLIN J.

1927

FIRST GARDEN CITY v. BONHAM-CARTER.

ordinary shares, and it was only since 1923 that a full dividend of 5 per cent. had been paid. There were now profits available for payment of arrears of dividend, after payment of the dividend for the current year, but not sufficient to pay the whole of the arrears:—

Held, that the fund available should be distributed rateably among the shareholders according to the respective amounts of the arrears of dividend payable on the shares held by them respectively.

In re Wakley [1920] 2 Ch. 205, 228 discussed.

ADJOURNED SUMMONS.

First Garden City, Ld., was incorporated on September 1, 1903, under the Companies Acts, 1862 to 1900, for the purpose of forming a garden city with a nominal capital of 300,000*l.* divided into 10,000 cumulative preference shares of 5*l.* each, 49,400 ordinary shares of 5*l.* each, and 3000 ordinary shares of 1*l.* each.

By the company's memorandum of association, clause 3 (D), an object of the company was "to pay upon the ordinary shares or stock of the company a cumulative dividend not exceeding 5 per centum per annum and to apply any balance of profit after such payment as aforesaid to any purpose which the company or its directors may deem for the benefit directly or indirectly of the town or its inhabitants."

Art. 129 of the company's articles of association provides: "Subject to the rights of the holders of any debentures or shares entitled to any priority, preference, or special privilege, the net profits of the company, after providing for a reserve fund and for depreciation of the company's property, shall be divided by way of dividend among the members in proportion to the amount paid up on the ordinary shares held by them respectively, but so that the dividends upon the ordinary shares for any year shall not exceed the aggregate rate of 5 per centum per annum. The surplus of the net profits of the company after payment of such dividends and the amount necessary to make up dividends for past years to the rate of 5 per centum per annum, shall be devoted to the provision of traffic facilities, water supply, lighting, drainage, markets, hospitals, libraries, baths or otherwise for the embellishment of the town, the provision of means of education, recreation or amusement for the people, or

for any other purpose which the company or its directors may deem for the benefit of the town or its inhabitants."

The issued capital of the company consisted of 9351 cumulative preference shares of 5*l.* each, 38,463 ordinary shares of 5*l.* each and 1704 ordinary shares of 1*l.* each, all fully paid or credited as fully paid. Of the ordinary shares 19,857 ordinary shares of 5*l.* each and 1407 ordinary shares of 1*l.* each were issued in 1904, and the balance had been issued from time to time. The financial year of the company ended on September 30 in each year and the dividend on the cumulative preference shares was always paid. No dividend on the ordinary shares was declared for the years 1904 to 1917, 2½*l.* per cent. dividend was declared and paid for each of the years 1918 to 1921 inclusive, 4*l.* per cent. for the year 1922 and 5*l.* per cent. for the years 1923 to 1926 inclusive.

Profits had now been earned which were more than sufficient to pay the full dividend of 5*l.* per cent. on the ordinary shares, and this summons was taken out for the purpose of ascertaining the manner in which the surplus should be applied in paying arrears of dividend, the fund in hand being insufficient to pay the whole of the arrears.

Andrewes-Uthwatt for the summons.

Swords for a holder of shares issued at an early date. It is submitted that the proper course is to pay off arrears on dividends for earlier years before coming to arrears in respect of later years. First the dividend for the current year should be paid and then the payment of arrears should commence for the first year in respect of which there were arrears of dividend and so on for each successive year: *In re Wakley.* (1) In Palmer on Companies, 12th ed., p. 801, it is suggested that it rests with a company to indicate the particular year in respect of which payment is made, but there is no authority for this. If the above contention is not accepted then this defendant adopts the contention that will be advanced by counsel for the next defendant.

(1) [1920] 2 Ch. 205, 216, 228.

TOMLIN J. 1927 FIRST GARDEN CITY v. BONHAM-CARTER.

Morton for the holder of shares issued at an intermediate period. None of the shareholders is entitled to priority. The amount in arrears on each share should be ascertained and the fund available after paying the dividend for the current year should be divided pro rata amongst the holders of shares which had not received the full dividend in any past year. If fairness is the test, this course is the best. There is nothing in art. 129 to enable the company to make distributions to some shareholders and not others. *In re Wakley* (1) is not really an authority to the contrary.

L. Cohen for the holder of shares issued at a late date. Art. 129 having indicated that the current dividend is to be paid first, the logical inference is that in paying off arrears the company should work backwards from that point so as to insure that for so long as possible all members should participate.

TOMLIN J. [after stating the facts and reading clause 3 (*d*) of the company's memorandum of association and art. 129 of the articles of association:] Apart from the provisions which I have read there is nothing to assist the solution of the question which now arises. The profits available for distribution are more than sufficient to pay 5 per cent. on the ordinary shares for the year, but they are not sufficient to pay the whole of what are popularly called the arrears of dividend. The question therefore arises how ought the fund available to be distributed among the ordinary shareholders.

It is said on behalf of those whose ordinary shares have an early origin that after paying the 5 per cent. dividend for the year the company must go back and begin at the far end and make up the dividends of the earliest year to 5 per cent. and then proceed to do the same for each subsequent year in succession so that the arrears are paid in full up to the latest date possible having regard to the amount of the fund available. Against this it is said, on behalf of holders of shares that are late in origin, that the proper course is to begin at the near end and that the company

(1) [1920] 2 Ch. 205, 216, 228.

should wipe off the latest arrears and work backwards to the earliest arrears. This argument is based on the language of art. 129, and it is said that, inasmuch as on that article the dividend for the year at the rate of 5 per cent. is first to be paid, it is only reasonable to suppose that that is what I may call "scratch" and that in paying off arrears the company is to work backwards.

The third view that I have been invited to adopt is that it must be ascertained what fund is available for arrears of dividend, and that the maximum distributable is ascertained by reference to the aggregate amounts which are claimable by the several shareholders, and that in distributing the available fund the company must distribute it rateably between the shares in proportion to the maximum in each case. The result is that when a share has been issued at an early date and has, say, six years' arrears, while another share issued at a later date has only three years' arrears of dividend, the company will distribute the available sum between the two in the proportion of 3 to 6.

Now those who contend that you must begin at the far end have referred me to a passage in *In re Wakley* (1), where Younger L.J. made some observations in regard to the sort of problem that I am considering. He seems rather to have taken the view that it would be right to begin at the far end. That observation of his, however, was I think obiter. It was not necessary for the decision of the case and I do not think that it was argued, except that the difficulty had been propounded by counsel in the course of his argument. Younger L.J. said: "The shares supposed are all of the same class; some of them by reason of their earlier issue and payment up of capital have a larger claim on the dividend fund than others." That no doubt is perfectly accurate, but in order to arrive at the conclusion that any of them are entitled to be paid first it is necessary, it seems to me, to establish that their claim is not merely larger, but also that it has priority. I can find nothing in the language of the memorandum or articles which gives to what I may call

(1) [1920] 2 Ch. 205, 228.

TOMLIN J.
1927
FIRST GARDEN CITY v. BONHAM-CARTER.

the potential dividend of any year priority over the potential dividend of any succeeding year. I find nothing in the nature of a priority, and it seems to me that prima facie there is no right to priority. The dividend, having regard to *In re Wakley* (1), is quite clearly a dividend for the current year, and it seems to me consistent with the decision of the Court in *In re Wakley* (1) that I should hold that in the absence of something which gives an express priority to one year over another, all the shares have to rank pari passu in regard to their total claim in respect of all the years.

If that be so, it seems to me the answer is to be found in the view which has been advanced by Mr. Morton, and that the duty of the company is to distribute the fund between the shareholders rateably in proportion to their several claims. They have no claim in any sense at all until profits are available, and when profits are available for dividend there is a maximum in respect of each share which can be received out of the fund. In my view the fund must be distributed rateably according to the several maxima.

Solicitors for all parties: *Balderston, Warren & Co.*

(1) [1920] 2 Ch. 205, 228.

H. C. G.

LORD TREDEGAR *v.* HARWOOD.

C. A.
1927
Oct. 14, 27.

[1926. T. 1051.]

Landlord and Tenant—Lease—Covenant to insure against Fire in named Office "or in some other responsible insurance office to be approved by lessor"—Whether Alternative given to Lessee to select Office for Approval of Lessor—Desire of Lessor that all Houses on Estate should be insured in one Office—Whether a Ground for Refusal of Approval.

The defendant was the assignee of a lease of a certain messuage for the residue of a term of ninety-nine years which contained a covenant by the lessee to insure against fire in the following terms: "The lessee shall and will . . . . insure and ever afterwards during the said term keep insured the said messuage . . . . in the joint names of the lessee and lessor in the Law Fire Office or in some other responsible insurance office to be approved by the lessor. . . . ." The defendant did not continue the policy in the Law Fire Office which was in existence at the time of the assignment to her of the premises, but took out a policy in the Atlas Company. The plaintiff, who was the ground landlord of the premises and also of a large number of other houses on the same estate, refused to approve of the Atlas Company on the ground that for purposes of estate management he required that all houses upon his estate should be insured in the same office. The defendant declined to insure in the Law Fire and insisted that under the covenant she had an option to insure either in the Law Fire Office or in some other responsible office to be approved by the lessor. In an action brought by the plaintiff against the defendant, in form for forfeiture of the lease by reason of breach of covenant, but in effect, to obtain a decision of the Court on the construction of the covenant:—

Held, that the covenant conferred an alternative on the defendant to be exercised at her volition; that the lessor, upon an office being submitted to him, provided that it fulfilled the conditions of being a responsible one, must come to a reasonable decision; that such decision must not be a capricious one or one that could be used by him to secure a personal end, even if that end were both purposeful and useful from his point of view; and that the decision must be in accordance with such considerations as were appropriate and would guide a reasonable man in coming to a decision whether a particular insurance office was or was not suitable for the purpose of meeting a loss by fire.

Decision of Tomlin J. reversed.

APPEAL from a decision of Tomlin J.

By an indenture of lease dated July 7, 1924, and made between the plaintiff, Lord Tredegar (therein called "the lessor"), of the one part and Henry Beavis (therein called "the lessee") of the other part, the plaintiff demised to the

C. A. 1927 LORD TREDEGAR v. HARWOOD.

lessee a certain plot of land with the dwelling-house thereon then in course of erection and now known as "Kerswell," 27 Axminster Road in the city of Cardiff, for the term of ninety-nine years from March 25, 1924, at the yearly rent therein mentioned and subject to the covenants and conditions therein contained. Amongst the covenants was a covenant by the lessee to insure the premises against fire which was in the following terms: "That the lessee shall and will immediately after the roof of the intended messuage shall have been laid on insure and ever afterwards during the said term keep insured the said messuage together with all erections and buildings for the time being erected on the piece or parcel of land hereby demised against loss or damage by fire to the full value of the said erections and buildings in the joint names of the lessee and the lessor in the Law Fire Office or in some other responsible insurance office to be approved by the lessor and shall upon his request produce to the lessor or his agents for the time being the policy for such insurance and the receipts for the annual payments." The lease also contained the usual proviso for re-entry on breach by the lessee of any of the covenants to be performed by him.

The demised premises formed part of freehold estates in Newport and Cardiff of which the plaintiff was the owner. Large areas were let on building leases similar in form to the lease in question and each contained a covenant to insure in similar terms to that above set out.

By an assignment dated July 29, 1924, Beavis assigned the demised premises to the defendant, Annie Harwood (hereinafter called "the lessee"), for the residue of the term of ninety-nine years granted by the lease, and she was now in possession and occupation of the demised premises.

The lessee had mortgaged her interest in the premises to the second defendants, the Principality Building Society (hereinafter called "the mortgagees"), who were also mortgagees of other property on the Tredegar Estates.

On May 8, 1925, the plaintiff's agent wrote to the lessee asking her to forward to him the renewal receipt for the policy of insurance for inspection in accordance with the

covenant and stating that the only office approved for insurance on the estate was the Law Fire Office. On May 14, 1925, the lessee wrote in reply that the house was insured through the defendant society.

The lessee having refused to renew the old policy or to effect a new policy with the Law Fire Office the plaintiff's agent on July 21, 1925, served on her a notice requesting her as assignee in possession of the land messuage erections and buildings comprised in the lease forthwith to produce to him the policy of fire insurance against loss or damage by fire to the full value of the said erections and buildings in the joint names of the lessor and lessee in the Law Fire Office and the receipt for the last annual payment in respect thereof.

The lessee having with the knowledge and support of the mortgagees persisted in her refusal the lessor on April 16, 1926, caused to be served on the lessee and the mortgagees the usual notice of forfeiture for breach of covenant under s. 146 of Law of Property Act, 1925.

The lessee and the mortgagees failed to comply with that notice and without the knowledge or approval of the lessor insured the premises in the Atlas Assurance Company, Ld., for 625*l.* in the names of the lessor, the lessee and the mortgagees, and the lessee claimed that such insurance was a due performance of the covenant.

The lessor thereupon commenced the present action for possession. There was no dispute as to the facts.

In his statement of claim and subsequent particulars the lessor stated that his reason for requiring insurance in the Law Fire Office was to facilitate estate management.

Although in form the action was for ejectment it was stated that the sole object of the lessor in bringing the action was to obtain a decision of the Court on the true construction of the covenant to insure. The action was accordingly dealt with on that basis, both before Tomlin J. and in the Court of Appeal.

The question raised on the covenant was whether under it the lessor could insist that the Law Fire Office should be

C. A. 1927 LORD TREDEGAR v. HARWOOD.

the only office to issue the requisite policy or whether the lessee was entitled to claim that the covenant offered her an alternative which she had rightly exercised in conformity with it. The point that she had not obtained the lessor's previous approval was not insisted on.

Tomlin J. held that the covenant did not give the lessee an alternative, and that she was, therefore, bound to insure in the Law Fire Office.

The lessee and mortgagees appealed. The appeal was heard on October 14, 1927.

Archer K.C. and *E. Foà* for the appellants. It is submitted that the covenant confers an option on the lessee as to what office she will insure in. The option is to insure either in the Law Fire Office *or* in some other responsible office to be approved by the lessor. The stipulation as to approval was inserted for the benefit of the lessor to protect him from possible risk of the office selected being unable to pay in the case of a fire taking place. The construction put upon the covenant by Tomlin J. is not the natural one. It gives no effect to the word "responsible." The approval of the lessor is confined to the responsibility of the office proposed by the lessee.

If the appellants are wrong on this point then it is submitted that the disapproval of the lessor must be of the particular office, and that here there has been no such disapproval. The lessor is not entitled in determining whether he will approve the office proposed to have regard to anything outside the office. The object of the covenant being to protect the lessor against the office being unable to pay in the event of a fire, the lessor is here seeking to use the covenant for a totally different purpose—namely, to facilitate estate management, which is a purely extraneous purpose and one not within the ambit of the covenant. The discretion given by the covenant is not absolute. The power of refusal is strictly limited and must be exercised for fire insurance reasons and not for some extraneous reason. Further, it is submitted that the lessor has in fact approved the Atlas Company within the meaning

of the covenant. There is no provision in the covenant for the signification of approval. To be approved means to be satisfied with. The disapproval here by the lessor destroys the option given to the lessee by the covenant, not only as regards the Atlas Company but also as regards all other offices. Under the covenant the lessor can only approve or disapprove : he cannot select. Selection is for the lessee.

In any case, the lessee having an option the lessor can only refuse to approve his choice on reasonable grounds : *Braunstein* v. *Accidental Death Insurance Co.* (1) The grounds must be absolute and not relative, that is, they must be relative to the relation of landlord and tenant in respect of the particular property : *Houlder Bros. & Co.* v. *Gibbs.* (2) The preference here of the lessor for a particular office for purely estate management reasons bears no reference to the object of the covenant. It may be a reason for approving the Law Fire Office, but it is not a reason for refusing to approve the Atlas Company. The construction sought by the respondent to be put upon the covenant would operate as a derogation from grant by destroying the option given by him : *White* v. *Harrow.* (3) The option is that of the lessee : *Dann* v. *Spurrier* (4), and must be construed favourably to her : *Burton & Co.* v. *English. & Co.* (5)

[They also referred to *Donald H. Scott & Co.* v. *Barclays Bank* (6) and *Foundling Hospital* v. *Lewis.* (7)]

Gavin Simonds K.C. and *Charles Romer* for the respondent. It is submitted that the covenant in this case is directory and gives no option to the lessee in the sense claimed. The obligation on the lessee is to insure in the Law Fire Office, or if for any reason that becomes impracticable then to insure in some other responsible office to be approved by the lessor. The word " responsible " is inserted in the covenant for the benefit of the lessee.

(1) (1861) 1 B. & S. 782, 795, 797.
(2) [1925] Ch. 198 ; Ibid. 575.
(3) (1902) 86 L. T. 4.
(4) (1803) 3 Bos. & P. 399.
(5) (1883) 12 Q. B. D. 218.
(6) [1923] 2 K. B. 1.
(7) (1904) Times Newsp., Aug. 8.

C. A. 1927 — LORD TREDEGAR v. HARWOOD.

[SARGANT L.J. The main risk in the case of a long lease is that of the lessee.]

The covenant is not intended to give a choice to the lessee. There is no real alternative given by it to the lessee. She has to insure in the Law Fire. The second alternative does not arise until the first fails.

[LORD HANWORTH M.R. Assume that the Law Fire is out of the way, who is entitled to the next move ?]

The lessee is bound to insure and is therefore entitled to put forward a name. So long as the Law Fire is available the lessee is not entitled to put forward a name.

[SARGANT L.J. Prima facie I should have thought that there was an alternative.]

If that view is wrong and the lessee has an option then inasmuch as the covenant says nothing about unreasonableness there is no ground for reading the word "unreasonable" into it. The lessor has an absolute discretion to approve or not approve of a particular office.

[SARGANT L.J. The lessor says that he prefers the Law Fire for estate management purposes. The result is to destroy the alternative.]

No doubt the alternative given may as a matter of construction be given a meaning which may result in there being no real alternative. Here there is an absolute right given to the lessor to give or to withhold his approval. It is sufficient for the lessor to say: "I do not approve the Atlas Company." There is no duty on him to approve. He can give his approval or withhold it.

Assuming, however, that the covenant is to be read as containing the words "such approval not to be unreasonably withheld," then it is submitted that the ground of refusal of approval may be reasonable although relative.

[SARGANT L.J. Then you get in conflict with *Houlder Bros. & Co.* v. *Gibbs*. (1)]

It is clear that in that case and in those which it followed that the word "reasonable" received a limited meaning. That line of cases, it is submitted, stands by itself. There is

(1) [1925] Ch. 198; Ibid. 575.

no ground for excluding from the reasonable ambit of the covenant the fact that it is more convenient to the lessor that all his houses should be insured in the same office.

Archer K.C. in reply.

Cur. adv. vult.

Oct. 27. The following judgments were delivered :—

LORD HANWORTH M.R. The facts in this case are not in dispute. It is an action to recover possession of premises demised by the plaintiff to the defendant's predecessor in title, by a building lease for ninety-nine years at a ground rent, upon the alleged default of the defendant to fulfil the terms of a covenant to insure against loss or damage by fire and upon the proviso for re-entry arising upon such default.

Although formally it is an ejectment action, the Court has been told that there is no intention on the part of the plaintiff to act according to his strict rights if they should be held such as to entitle him to recover possession of the premises demised. On both sides the purpose of the proceedings is to ascertain the true interpretation to be placed upon the covenant to insure. The terms of it are as follows. [His Lordship read the covenant and continued :] For reasons of estate management which are intelligible, the plaintiff desired that all policies of insurance taken out by his tenants should be those issued by the Law Fire Office. And a letter written by his agent on May 8, 1925, represents his attitude in the matter: "Tredegar Estate, Newport, Monmouthshire. 8th May 1925. Madam, 27 Axminster Road, Cardiff. Policy No. 2049938. I am informed by the Law Fire Office that the above mentioned policy which fell due at Ladyday last has not yet been renewed. Kindly give this matter your immediate attention and forward me the renewal receipt for this policy for inspection in accordance with the covenants of the lease. I may add that the only office approved for insurance on this estate is the Law Fire Office. Yours faithfully, (sgd.) J. I. Storrar." In other words the plaintiff has decided that a policy issued by the

C. A. 1927 LORD TREDEGAR v. HARWOOD. Lord Hanworth M.R.

Law Fire Office is the only one that will be a sufficient compliance with the covenant to insure. The defendant, who has mortgaged her property to the second defendants, has effected through them an insurance with the Atlas Company. This policy is not questioned as to amount, or terms or conditions, by the plaintiff, nor does he dispute that the Atlas Company is a responsible office within the meaning of the covenant. The only issue therefore is whether under the covenant set out above, the plaintiff can insist that the Law Fire Office shall be the one and only office to issue the requisite policy; or whether the defendant is entitled to claim that the covenant offers an alternative which she has rightly exercised in conformity with it.

For the plaintiff it is argued that the covenant must be read as offering no alternative, but as insisting upon the Law Fire being the office in which the tenant is directed to insure, failing which for any reason, another office may be agreed upon and accepted by the landlord. It is said that the covenant is directory, and that the so-called alternative part of it only comes into play if and when for some reason the Law Fire Office was not available as the insurer, and, secondly, that in any case the lessor can refuse his consent at his absolute discretion.

The defendant contends that the covenant offers the tenant a true alternative at his or her election—that the tenant can select the office and submit it to the landlord, whose approval is required to the office selected upon the defendant's initiative, and ought not to be refused upon a ground extraneous to the purpose of the insurance.

The form of the covenant is one that appears and has appeared for many years in well known text-books upon the law of landlord and tenant (see Woodfall's Landlord and Tenant, 21st ed., p. 1204), and the purpose of taking the policy in the joint names of the lessor as well as the lessee is to make the insurance available for the benefit of both parties who naturally have an interest in the application of the moneys received under the policy, if and when a loss has occurred. Under the terms of the covenant an express

provision is inserted in that part of it which deals with the failure of the tenant to insure, enabling the lessor to insure as "he may think fit," and thus eliminating any choice from the tenant. It may well be that the expression of the independence of the lessor in these circumstances from the lessee was required when in the previous part of the covenant the choice of the tenant had been denoted.

The form of the covenant as it stands appears on its face to give an alternative to the tenant. Although authority from decision is lacking, it is noticeable that Warrington L.J. read such a covenant as conferring a choice upon the tenant subject to the approval of his landlord. See *Upjohn* v. *Hitchens* (1), where the Lord Justice referred to a similar covenant which required the approval of the landlord to "some other office apparently to be selected by the lessees."

The meaning attributed to the words by the plaintiff requires the addition of some words, such as "failing which," or others to indicate that the apparent alternative was really a subservient clause, only coming into play upon the failure of the Law Fire Office to accept the risk. I see no reason for adopting this device to avoid the plain meaning of the words expressing an alternative. "To be approved" also seems to indicate that the submission of another office was to be originated by the lessee with the right and duty upon the landlord to exercise his decision as to approval or disapproval.

Cases have been referred to in which the right to an arbitrary or capricious negation of approval was not accepted: see *Braunstein* v. *Accidental Death Insurance Co.* (2); *Donald H. Scott & Co.* v. *Barclays Bank* (3); and *Houlder Bros. & Co.* v. *Gibbs.* (4)

I am unable to see why this covenant is not to be construed according to its terms and to be given a reasonable meaning. It appears to confer an alternative upon the tenant to be exercised at his volition. Upon the office submitted to him—provided that it fulfils the condition that it is a

(1) [1918] 2 K. B. 48, 55, 56.
(2) 1 B. & S. 782.
(3) [1923] 2 K. B. 1.
(4) [1925] Ch. 575, 583.

C. A. 1927

LORD TREDEGAR v. HARWOOD.

Lord Hanworth M.R.

responsible one—the landlord must exercise a reasonable decision. Not a capricious decision—not one that can be used by him as a pretext to secure a personal end—even if that be both purposeful and useful from his point of view; but in accordance with such considerations as are appropriate to, and would guide a reasonably minded man in coming to a decision whether a particular insurance office was or was not suitable for the purpose of meeting loss or damage by fire should such be occasioned to the premises. I see no reason for saying that an absolute discretion is given to the landlord—if that term is intended to allow the landlord complete freedom in introducing external and extraneous considerations. I adhere to my words used in *Houlder Bros. & Co.* v. *Gibbs* (1) as to considerations foreign to the relation of landlord and tenant, and extrinsic from the lessee.

The view above expressed differs from that of Tomlin J., who did not think that the covenant gave an alternative to the tenant, and the remainder of his judgment is based on that premiss. For the reasons I have indicated I think that the covenant must be read in the light of the plain meaning of its words—and that the conjunction "or" was intended to introduce a real alternative. With all respect, therefore, to Tomlin J., I prefer the interpretation suggested by the appellant.

The appeal will be allowed with costs and the action must be dismissed with costs.

SARGANT L.J. The first question here is the true construction of the covenant. The respondent has contended that it does not give the lessee an alternative, but that the lessee is bound to insure in the Law Fire Office, and that it is only if such an insurance is impossible that he can insure in another office. In my judgment that view is unsound as involving the insertion after the word "or" of some such words as "failing that office," and further as not giving due effect to the word "approved."

To my mind the words of the covenant in their ordinary meaning impose on the lessee an alternative obligation only;

(1) [1925] Ch. 583.

and the lessee can fulfil his obligation by insuring either in the Law Fire Office or at his option in some other responsible office approved by the lessor. If the lessee elects for the second alternative, it is for him to submit the name or names of one or more "other" responsible office or offices in which he proposes to insure, and it is then for the lessor to consider whether he does or does not approve the office or one of the offices submitted. The use of the word "approved" indicates that the original selection or choice of an office is in the lessee, and that the right or power of the lessor is limited to considering and approving or declining to approve the office so selected or chosen.

It may be worth while to note that the form of covenant given alike in the 3rd and 12th editions of Key & Elphinstone's Precedents, published in the years 1890 and 1926 respectively, provides for insurance in a specified office or in some other office "approved" by the lessor, and contains as a variant for the word "approved" the word "selected"; thus clearly making a distinction between a more stringent form in which the lessor definitely prescribes the alternative office, and the less stringent form found here in which his function is limited to approving the office. My own experience has been that the less stringent form is the more ordinary one, and it is the form in the precedents given in Woodfall on Landlord and Tenant, 21st ed., p. 1204, though on the other hand Mr. Foà in his work on the same subject, 6th ed., p. 274, mentions the word "directed" as being that in ordinary use. But it is at least clear that the wording of such a covenant has been carefully considered by those dealing with these matters, and that there is a clear differentiation in wording in the forms in common use, and that this is for the purpose of marking a difference in the two cases between the relative positions of the lessor and lessee in regard to insurance against fire.

What then are the limits if any of the lessor's right or discretion in approving of an office selected by the lessee? In my opinion, there are limits on the exercise of this right similar to those which in the recent case of *Houlder Bros.*

C. A. 1927 LORD TREDEGAR v. HARWOOD. Sargant L.J.

& Co. v. *Gibbs* (1) we held applicable to a lessor's right or discretion in the matter of consenting to an assignment to a proposed assignee. Here, as there, I think the lessor, in considering whether to approve or not, cannot act arbitrarily or capriciously, must have regard to the purpose of the covenant, and cannot take into account extraneous or collateral considerations unconnected with the relationship of landlord and tenant in regard to the subject-matter of the demise. Here the subject-matter of the demise was a single building only, and the purpose of the covenant obviously was to give adequate security for the reinstatement of that building in case of damage by fire. It is not suggested on the part of the plaintiff that any insufficient or inferior security as regards this building will be afforded by an insurance with the office proposed by the defendant, namely, the Atlas, than by an insurance with the Law Fire. All the reasons given by the lessor have reference to the circumstance that he owns a large building estate of which this building forms part, and that it is for his convenience as the owner of this large estate that the insurance of this particular building should be in the same office as those of his other buildings. In my judgment the fact that the plaintiff is the freeholder of these other buildings is an extraneous or collateral circumstance unconnected with the demise of the particular house, just as were the special circumstances in the case of *Houlder Bros. & Co.* v. *Gibbs* (1) or in the cases there relied on.

Further, it is to be noted that in effect the plaintiff has not expressed a want of approval of the Atlas Office, but has merely expressed a preference for the Law Fire Office.

I have dealt with the matter on these broad considerations because this covenant is one in common use and the present appeal may affect a large number of lessors or lessees. But there is another and shorter way of dealing with the case. For assuming that the covenant gives the lessee an alternative or option, as in my opinion it clearly does, the plaintiff in declining by his agent's letter of May 8, 1925, to approve

(1) [1925] Ch. 575.

any office except the Law Fire Office has in effect claimed to strike out this alternative and deprive the lessee altogether of his option. Such a claim is, in my judgment, quite inadmissible.

I agree that the appeal should be allowed and the action dismissed.

LAWRENCE L.J. The avowed object of the plaintiff in bringing this action is to have it decided whether under the terms of the covenant for insurance contained in his leases he is justified in the policy which he has recently determined upon of insisting that his lessees should insure in the Law Fire Office to the exclusion of any other office; accordingly the plaintiff has purposely abstained from taking any objection on the ground either that no attempt was made to obtain his approval of the Atlas Assurance Company or that the name of the mortgagee was added to the policy of insurance.

The broad question thus raised is of importance both to the plaintiff and to his lessees. As regards the plaintiff it is to his advantage from the point of view of estate management that he should be able to compel his lessees to insure in the Law Fire Office, with which office he has made an arrangement for the notification to him of the non-payment of premiums under all policies effected by his lessees. As regards the lessees it is to their advantage to have the power to select the insurance office so as to be in a position to comply with any demands which may be made upon them by their mortgagees to insure in some office suggested by them.

The question turns entirely upon the true meaning and effect of a few simple words in the covenant to insure. The covenant is in one of the well known common forms, and it is perhaps worthy of note that the lessor has not adopted another equally well known form which provides for insurance in a named insurance office or in such other insurance office as the lessor should direct, which if it had been adopted would have justified the plaintiff in selecting the insurance office but might have rendered his leases less attractive.

C. A. 1927 LORD TREDEGAR v. HARWOOD. Lawrence L.J.

I confess that but for the opinion expressed by the learned judge and the arguments of counsel for the respondent, I should have thought that the construction of the covenant did not present any real difficulty. It seems to me that according to the plain meaning of the language employed the lessee is given the option of complying with his covenant in one or other of two different ways—namely, either by insuring in the Law Fire Office or by insuring in some other responsible insurance office to be approved of by the lessor. The expression "to be approved of" connotes that the choice of the other office is in the lessee, and that the lessor is to sanction or ratify that choice and not to make it himself. The practical effect of the covenant is that the lessee if so minded may insure in some responsible insurance office other than the Law Fire Office and may choose such other office, which however must be submitted for approval to and be approved of by the lessor. If this be the true meaning and effect of the covenant, it follows in my judgment that the lessor is placed under an implied obligation to consider any responsible insurance office selected by the lessee and to approve of it unless he has some reasonable ground for objecting to that particular office; indeed, if it were otherwise, the option given to the lessee would be altogether illusory.

The attitude adopted by the plaintiff in insisting upon the Law Fire Office and in declining to approve of or even consider any other insurance office in my opinion is clearly wrong, as it amounts to a complete negation of the right of the lessee to fulfil his obligation under the covenant by insuring in some responsible office other than the Law Fire Office. The lessor is in effect treating the covenant as if it were a covenant to insure in the Law Fire Office only and as if the alternative method of complying with it had not been inserted.

In the face of the declared intention of the plaintiff not to approve of any insurance office other than the Law Fire Office the question as to the nature of the ground upon which he would be justified in withholding his approval of any particular office selected by the lessee does not in my opinion

arise. Nor indeed is this question of any real practical importance to the parties, as the plaintiff does not suggest that, if he be wrong in the attitude he has taken up, the Atlas Assurance Company is not in all respects a suitable office in which to insure the buildings comprised in the lease. As however the question has been debated I desire to express my entire concurrence with the opinions expressed on this point by the Master of the Rolls and Sargant L.J. The implied obligation resting on the lessor to approve of a responsible insurance office selected by the lessee necessarily involves an obligation not to withhold such approval arbitrarily or unreasonably. The principle upon which the case of *Houlder Bros. & Co.* v. *Gibbs* (1) was decided in my opinion applies as much to a case (such as the present) where the obligation not to withhold approval unreasonably is implied as to a case where such obligation is expressed. According to that principle the plaintiff is not entitled to withhold his approval for reasons which, although possibly rational in themselves, are extraneous to the subject-matter of the contract constituting the relationship of landlord and tenant in respect of the particular property comprised in the lease.

I agree that the appeal succeeds, with the consequences indicated by the Master of the Rolls.

Appeal allowed.

Solicitors for appellants: *Church, Adams, Tatham & Co., for Merrils, Ede & Nicholls, Cardiff.*

Solicitors for respondent: *Rider, Heaton, Meredith & Mills, for Davis, Lloyds & Wilson, Newport, Mon.*

(1) [1925] Ch. 198; Ibid. 575.

W. I. C.

C. A. 1927

EVE J. *May* 10, 31.

C. A. *Oct.* 20, 21.

In re NATIONAL BENEFIT ASSURANCE COMPANY, LIMITED.

Ex parte ENGLISH INSURANCE COMPANY, LIMITED.

[00375 of 1922.]

Insurance (Marine)—Company—Winding Up—Proof of Debt—Agreement between two Insurance Companies—Participation in Profits and Losses—Construction—Absence of Stamped Policies—Rejection of Proof—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *ss.* 91, 92, 93—*Marine Insurance Act*, 1906 (6 *Edw.* 7, *c.* 41), *ss.* 22, 23.

By an agreement between the E. Insurance Company and the N. Assurance Company, therein described as a participation agreement, it was (inter alia) provided that the N. Company should be entitled to and accept a quota of a one-eighth of all risks arranged by the E. Company through its marine department. The expression "marine insurance" was defined to mean all forms of insurance, including war risks and reinsurance transactions, of the marine department of the E. Company. The participation was fixed at 50 per cent. of the share retained by the E. Company at their own risk of all marine insurances accepted on and after a specified date. The liability of the two companies was to commence at the same time, the expressed intention being that the two companies should participate pari passu in all the insurances accepted by the E. Company. The N. Company was to be entitled to a proportionate part of the net premium and other benefits of the E. Company and to bear its proportionate share of losses. No stamped policy of assurance was ever issued to the E. Company by the N. Company in respect of any risk arising within the terms of the agreement. The N. Company having been ordered to be wound up by the Court, the E. Company claimed to prove in respect of certain claims arising under the agreement. The liquidator disallowed the proof:—

Held, by Eve J. and the Court of Appeal, that the agreement was a contract "for sea insurance" within the meaning of ss. 92 and 93 of the Stamp Act, 1891, and as such not being in the form of a duly stamped policy containing the particulars required by s. 23 of the Marine Insurance Act, 1906, was invalid.

Held, therefore, that the proof of the E. Company was rightly rejected.

Home Marine Insurance Co. v. *Smith* [1898] 1 Q. B. 829; [1898] 2 Q. B. 351 applied.

SUMMONS.

This was an application by the English Insurance Company, Ld. (hereafter called the "English Company"), a creditor of the National Benefit Assurance Company, Ld. (hereafter referred to as the "National Company"), for an order that the decision of the Senior Official Receiver, dated November 25,

1925, rejecting the proof of the applicants in these matters, be reversed, and for an order directing that the proof be allowed for such sum as on examination of account should be found due. There was an agreed statement of facts between the parties. The question raised by the summons was whether the English Company was disentitled from proving in the liquidation of the National Company in respect of claims arising under an agreement next hereafter mentioned by reason that no stamped policies of marine insurance were issued to the English Company by the National Company, as regarded any matters falling within that agreement. All questions as to amounts were to remain open. By the agreement in question, which was dated January 27, 1922, and made between the two companies, it was provided by art. 1 that the National Company should be entitled to and should accept a quota participation equal to a one-eighth share of all and every risk, excluding obligatory reinsurance agreements with other companies, arranged by the head office of the English Company upon any marine insurance, or upon any war risk, whether alone or in conjunction with marine risks accepted by the English Company through its marine department at 23 Birchin Lane, London, E.C. 2. The expression "marine insurance" as used in this agreement was declared to include all forms of insurance, including war risks and reinsurance which were or might be transacted by the marine department of the company. By art. 2 the above participation was to be equal to 50 per cent. of the share retained by the English Company at their own risk of all marine insurance accepted on or after January 1, 1920, the English Company being at liberty to give similar participations to others, but so that the risk of that company should never be less than 200 per cent. of the participator. By art. 3 the liability of the two companies was to commence automatically at the same time, any cover given directly or indirectly by the English Company was immediately to become binding on the participator, the intention of the agreement being that the two companies should participate pari passu in all the marine insurances, including war risks

C. A. 1927 — NATIONAL BENEFIT ASSURANCE CO., *In re.* ENGLISH INSURANCE CO., *Ex parte.*

accepted by the English Company (including their agencies and branches at home and abroad), through its marine department, as stated in the judgment of Eve J. By art. 5 the participator was to be entitled to a proportionate part of the net premiums, salvages and other benefits received by the English Company and should bear the proportionate share of all losses. The effect of the other articles of this agreement is sufficiently stated in the judgment of the Court. Throughout the currency of this agreement many risks coming within its terms were accepted by the English Company and were acted upon according to the provisions therein contained and an addendum not affecting the present question; but the English Company did not furnish any particulars in regard to the risks effected by them, nor were they bound to do so by the agreement. They rendered a statement of premiums and losses quarterly, and cash settlements were made from time to time. Claims were set off against the premiums, and the balance was paid to or by the English Company.

No stamped policy of insurance was ever demanded by the English Company, or issued to it by the National Company, in respect of any risk coming within the terms of the agreement. On July 25, 1922, the National Company was ordered to be wound up by the Court, and the Official Receiver was appointed the liquidator thereof. The English Company claimed that an account fell to be taken on the terms of the agreement alone, and that in taking such account the appropriate share of losses on risks accepted by them and falling within the terms of the agreement were to be debited to the National Company. This claim was disputed by the liquidator of the National Company on the ground that no stamped policy of sea insurance had ever been issued to the English Company by the National Company and that the agreement between them was therefore void.

The summons was heard before Eve J. on May 10, 1927.

Porter K.C. and *Andrewes-Uthwatt* for the summons. The question is whether, upon the true construction of this

agreement, it is one for participation with a sharing of profits and losses, or a contract of marine insurance. It is expressly called a participation agreement and the National Company a participator. The English Company is in the position of agent of the National Company to effect insurances, and the Stamp Act, 1891, has no application at all.

Alternatively, inasmuch as there is to be a participation of profits and losses a partnership exists between the two companies. There was no provision in the agreement for any policies to be issued. The real question, therefore, is what is the true construction to be placed upon this agreement ?

Dunlop K.C. and *L. W. Byrne* for the liquidator. The liquidator is no partisan in this matter, and only requires to know how he is to act and what is the true construction of the agreement. It is submitted it is in effect a contract for marine insurance and as such is void, because no stamped policy of insurance has ever been issued to the English Company in accordance with the provisions of the Stamp Act, 1891, ss. 91, 92 and 93 : Arnould on Marine Insurance, 11th ed., vol. ii., p. 1667, where a policy of sea insurance is defined. In the present agreement no relationship of principal and agent arises. As is stated in one of the later articles of the agreement the agreement is binding in honour only, and not at law, and could not be enforced in the absence of a stamped policy. It is a contract for marine insurance within the reported cases. There are different forms of insurance, one of which is illustrated in *Home Marine Insurance Co.* v. *Smith.* (1) The present case is in the form of a treaty of reinsurance. Another form is illustrated by *Attorney-General* v. *Forsikringsaktieselskabet National (of Copenhagen).* (2) [They also referred to *Aramayo Francke Mines, Ld.* v. *Eccott* (3) ; *In re Norwich Equitable Fire Assurance Society. Claim of Royal Insurance Co.* (4) ; *In re Arthur Average Association for British, Foreign, and Colonial Ships. Ex parte Hargrove & Co.* (5) ; *Empress Assurance Corporation* v. *C. T. Bowring &*

(1) [1898] 1 Q. B. 829 ; [1898] 2 Q. B. 351.
(2) [1924] 1 K. B. 366.
(3) [1925] A. C. 634.
(4) (1887) 57 L. T. 241.
(5) (1875) L. R. 10 Ch. 542.

C. A. 1927

NATIONAL BENEFIT ASSURANCE CO., *In re.* ENGLISH INSURANCE CO., *Ex parte.*

Co. (1); *Glasgow Assurance Corporation* v. *William Symondson & Co.* (2); and *Nagoremull* v. *Triton Insurance Co.* (3)] In this last case it is clearly laid down that no contract for sea insurance is valid unless expressed in a sea policy. The contract in that case was by word of mouth to issue a policy of marine insurance.

Porter K.C. in reply referred to *Brett* v. *Beckwith.* (4)

Cur. adv. vult.

May 31. EVE J. delivered the following written judgment: By this summons the English Insurance Company, Ld. (which I shall hereafter refer to as the "English Company"), seeks to set aside the rejection by the liquidator of the National Benefit Assurance Company, Ld. (hereafter referred to as the "National Company"), of a proof, carried in by it in the winding up of the National Company on the ground that the debt thereby sought to be established arose out of a contract for sea insurance in respect of which no stamped policies of marine insurance were issued to the English Company.

It is not disputed that if the contract is properly described as a contract for sea insurance it is invalid in that it does not comply with the provisions of the Stamp Act, 1891, s. 93, or the Marine Insurance Act, 1906, ss. 22 and 23, and in these circumstances the sole question for determination is the true construction of the actual contract between the two companies. Is it, or is it not a contract of marine insurance?

It is embodied in a document dated January 27, 1922, with a schedule and addendum attached, but not affecting its construction.

It is described as a participation agreement, and it provides in art. 1 that the National Company shall be entitled to and shall accept a quota participation equal to one-eighth share of all and every risk, excluding obligatory reinsurance agreements with other companies, arranged by the head office of the English Company upon any marine insurance, or upon any war risks, whether alone or in conjunction with marine risks, accepted by the English Company (including

(1) (1905) 11 Com. Cas. 107.
(2) (1911) 16 Com. Cas. 109.
(3) (1924) 41 Times L. R. 168.
(4) (1856) 26 L. J. (Ch.) 130.

their agencies and branches at home and abroad), through their marine department.

The expression "marine insurance," as used in the agreement, means all forms of insurance, including war risks and reinsurance transacted by the marine department of the English Company.

By art. 2 the participation was fixed at 50 per cent. of the share retained by the English Company at their own risk of all marine insurance accepted on and after a date therein mentioned. The maximum limit of the National Company by any one ship was fixed at 1875*l.*, and any special reinsurances effected by the English Company of risks within the scope of the agreement were to be for common account of the two parties. Under art. 3 the liability of the two parties was to commence automatically at the same time, any cover given by the English Company becoming immediately binding on the National Company, the expressed intention being that the two companies should participate pari passu in all the marine insurances accepted by the English Company through its marine department.

Articles 4 to 7, inclusive, free the English Company from any obligation to furnish any particulars in regard to risks accepted, and limit the right of the National Company to the receipt of monthly statements of premiums and losses only. It is to be entitled to a proportionate part of the net premiums, salvages, and other benefits received by the English Company, and is to bear its proportionate share of the losses, including any loss due to failure on the part of the original assured to pay the premium. The whole control of the business, including the settlement of all claims and the institution or defence of legal or other proceedings, is committed to the English Company, which is to receive as consideration for the agreement and as remuneration for obtaining, managing, and supervising the business, a commission of $2\frac{1}{2}$ per cent. on the net premiums paid or allowed to the National Company in respect of its participation, and a commission of 10 per cent. on the profits derived by the National Company from the whole of the business under the agreement.

C. A. 1927 NATIONAL BENEFIT ASSURANCE CO., *In re.* ENGLISH INSURANCE CO., *Ex parte.* EVE J.

Such are the relevant terms of the document I have to construe, but I must not omit to mention two passages which were relied upon as indicating some doubt on the part of the contracting parties as to the efficiency of their bargain in all the circumstances. Article 10 commences with these words: "This being an agreement executed in a spirit of trust, one with the other, the participator" [that is the National Company] "is absolutely bound in every case to follow the fortunes of the [English] Company." And in the arbitration clause it is agreed that all disputes which may arise between the two contracting parties "shall be settled by an equitable and liberal interpretation of the provisions of this agreement according to the spirit thereof," and that "the arbitrators are relieved from all judicial formalities and may abstain from following the strict rule of the law."

The document, it has been suggested, is one whereby the English Company is appointed the agent of the National Company for effecting insurances, or, alternatively, as being one in the nature of a partnership agreement, but whatever be the particular appellation applied to it there cannot in my opinion be any real doubt as to its true character. It is intended to cover marine risks; it is a contract of reinsurance, under which in return for a proportion of the premiums paid to cover marine risks the National Company is bound to indemnify the English Company against a corresponding proportion of any loss incurred. It is, therefore, a contract for sea insurance, and not being expressed in a policy it is invalid, in that the only form of contract of sea insurance which the law recognizes is a duly stamped policy.

I think, therefore, that the liquidator was right and that this summons must be dismissed, but as the liquidator makes no objection the costs will be paid out of the assets.

G. M.

C. A. The English Company appealed. The appeal was heard on October 20 and 21, 1927.

Porter K.C., *Andrewes-Uthwatt* and the *Hon. Michael Morris* for the appellants.

Dunlop K.C. and *L. W. Byrne* for the respondent liquidator of the National Company.

The arguments used in the Court below were substantially repeated.

LORD HANWORTH M.R. This is an appeal from the decision of Eve J., who confirmed the rejection of proof in the liquidation of the National Benefit Assurance Company. The English Insurance Company were insurers carrying on (inter alia) the business of marine insurers, and they made an agreement with the National Company, which was signed by the English Company on January 27, 1922, and by the National Company on February 1, 1922. From the agreed statement of facts upon which this case was taken before Eve J. and which is before us, it appears in para. 5 that, "Throughout the currency of the agreement many risks coming within the terms of the agreement were accepted by the English Company. The matters entering the proof of the English Company include claims in respect of risks which were ceded to the London and Yorkshire Insurance Company from the inception of the arrangement with that company and claims in respect of risks accepted by the National Company from the inception of the participation agreement with the National Company." The only reason why the London and Yorkshire Insurance Company finds a place in this statement is that they stood in the position which was taken over from them by the National Company. Para. 6 is: "The practice of the two companies followed in all material respects the terms of the agreement and the addendum. The English Company did not furnish any particulars in regard to risks accepted coming within the terms of the agreement": see art. 4. They rendered a statement of premiums and losses quarterly. In respect of losses the details were presented on bordereaux. Cash settlements were made from time to time, claims being set off against the premiums and the balance being paid to or by the English Company. Then under para. 8: "No policy of insurance was ever demanded by the English Company" to see what

C. A. 1927

NATIONAL BENEFIT ASSURANCE CO., *In re.* ENGLISH INSURANCE CO., *Ex parte.*

Lord Hanworth M.R.

was the risk that they engaged in, "or issued to the English Company by the National Company in respect of any risk coming within the terms of the agreement."

Now it is conceded, indeed it is common to the argument on both sides, that if this agreement made in February, 1922, provided for a reinsurance on the part of the National Company of risks undertaken by the English Company, then the claim fails, for the liquidator in the liquidation of the National Company cannot recognize and allow claims in respect of so called honourable, as distinguished from legal, obligations. It is stated in the statement of facts accordingly: "The only question falling to be decided is whether the English Insurance Company, Ld., is disentitled from proving in the liquidation of the National Benefit Assurance Company in respect of claims arising under the agreement hereinafter mentioned by reason that no stamped policies of marine insurance were issued to the English Company by the National Company as regards any matters falling within that agreement." It is admitted that there being no stamped policies of reinsurance no reinsurance was validly affected, because under the Stamp Act, 1891, s. 92, sub-s. 1, it is provided that, "For the purposes of this Act"—that is the Stamp Act—"the expression 'policy of sea insurance' means any insurance (including reinsurance)," and by s. 93, sub-s. 1: "A contract for sea insurance . . . . shall not be valid unless the same is expressed in a policy of sea insurance," and sub-s. 3: "A policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and sum or sums insured, and is made for a period not exceeding twelve months." There were no such policies of sea insurance. There were no policies which could satisfy those sections of the Stamp Act, and thus under para. 1 of the agreed statement of facts it is stated that the only question is whether the English Company is disentitled because there were no stamped policies of marine insurance or, I should put it, no policies of marine insurance existing and stamped within the meaning of the Stamp Act. Thus, if the contract made early in 1922 is a contract of reinsurance

there is no claim that arises upon it in respect of which proof can be carried in in the liquidation. To get over that difficulty it is said that this contract made between these two insurance companies was of a different nature. It is said that somehow or other the English Company were acting for the National Company so as to bring the National Company on to the risks which were insured by the English Company, through the agency of the English Company, or as co-contractors with the English Company in insuring the risks for the assured, the latter, the assured, being upon the basis of this argument entitled to look to both the companies or either of them upon a loss occurring.

I have already read the statement of facts, which shows how the business was conducted between these two companies —namely, cash payments were made from time to time on policies issued, and there was a statement rendered of premiums and losses quarterly.

Now what are the losses ; what is the nature of the claim that the English Company seeks to bring in in the liquidation of the National Company ? It is a claim by the English Company to be indemnified by the National Company for losses paid under policies which the English Company issued, and losses which were incurred within the meaning of those policies by the assured in respect of marine risks, losses which had to be paid by the English Company direct, and were paid direct to the original assured. Now the appellants are really driven to say that the National Company could have been directly sued, and it is suggested that either by means of an agency, or as co-contractors somehow or another, the National Company were liable upon the risks ; but, as I have pointed out, the statement of facts really negatives that, and the policies, or the relations created, must comply with the section of the Insurance Act. Whose losses are these in respect of which the English Company asks for an indemnity ? By s. 23 of the Marine Insurance Act, 1906, a marine policy must specify the name of the assured, or some person who effects the insurance on his behalf, the subject-matter insured, and the risk insured, the sum insured—I am

C. A. 1927

NATIONAL BENEFIT ASSURANCE CO., *In re.* ENGLISH INSURANCE CO., *Ex parte.*

Lord Hanworth M.R.

not reading it all—and the name or names of the insurers. There is no policy on which the name of the National Company appears as insurers—no policy in respect of which a loss has arisen. In all the policies that were issued the names of the insurers who insured the assured on those policies were the English Company, and there are no losses for which the English Company seeks indemnity against the National Company, which the National Company had to make good, or which they were liable to make good directly to the assured. Bearing in mind therefore s. 23 of the Marine Insurance Act, 1906, and the two sections of the Stamp Act which I have mentioned, one now approaches the agreement to which I have already referred. It is called a participation agreement. That may be an equivocal word, not indicating whether the National Company are to be joint insurers on the same basis with the English Company, or whether it is a reinsurance; but when one considers art. 1, the words are: "The participator shall be entitled to and shall accept a quota participation equal to a one-eighth share of all and every risk . . . . upon any marine insurance or upon any war risks whether alone or in conjunction with marine risks accepted by the company . . . . through the marine department of the company at 23 Birchin Lane." Then by art. 3: "The liability of the participator shall commence automatically at the same time as that of the company, and any cover given directly or indirectly by the company shall immediately become binding on the participator, the intention of this agreement being that the company and the participator shall participate pari passu in all the marine insurances, including war risks accepted by the company . . . . through its marine department." Bearing those sections that I have referred to in mind, bearing also in mind the manner in which this agreement has been implemented as between the two insurance companies, one has to consider its nature, and it appears to me that Eve J. was right in coming to the conclusion that it was intended to be, and has operated as, a reinsurance agreement, and not otherwise. The attempt now made to say that there was a direct liability upon the National

Company cannot be established, and I think that the conclusions which are dealt with in *Home Marine Insurance Co.* v. *Smith* (1), and in which a judgment of Mathew J. was affirmed, are by parity of reasoning applicable to the present case. The only way in which this agreement could be effective between the parties was by way of reinsurance, and I think it is contrary to the agreement to say that its purpose was or that it was effected to impose any direct responsibility on the National Company towards the assured, who were insured by and looked to the English Company alone. For these reasons it appears to me that Eve J. came to a right conclusion, that the agreement is one for reinsurance, and therefore that the proof tendered must be rejected and the appeal dismissed with costs.

SARGANT L.J. I am of the same opinion. The main question here is whether this agreement between the English Insurance Company and the National Benefit Assurance Company of February 27, 1922, is in fact a reinsurance treaty, in which case, of course, apart from there being reinsurance policies actually issued, there could be no legal claim by the English Company against the National Company for the agreement by the National Company to reinsure. Now, when the agreement was first read by Mr. Porter I noticed it was called a participation agreement to begin with, and although that phrase might have been modified by something that occurred in the body of the document, yet as the document was read my prima facie impression was confirmed. It appeared to me that its meaning was, that the English Company were to carry on their business in the way in which they had been carrying it on as principals, and that the National Company were, as between themselves and the English Company, to receive a proportion of the premiums paid to the English Company, less certain commission, and in return for that to bear, and indemnify the English Company against, a proportion of the losses suffered by the English Company as principals. When

(1) [1898] 2 Q. B. 351.

C. A. 1927

NATIONAL BENEFIT ASSURANCE CO., *In re.* ENGLISH INSURANCE CO., *Ex parte.*

Sargant L.J.

you look at the agreed statement of facts in this case it appears that the business was in fact transacted as between those two companies upon that basis of participation for reinsurance; and further the first fact mentioned by Mr. Dunlop, which struck me very forcibly, was that the claim here is not in respect of any right of any assured directly as against the National Company, but is a claim by the English Company to be indemnified by the National Company in respect of a proportion of the losses which the English Company has suffered in the course of carrying out the agreement

Now whether one looks to the definition of reinsurance in Arnould on Marine Insurance, 10th ed., s. 324, p. 444, or to the definition of it quoted by Scrutton L.J. in *Attorney-General* v. *Forsikringsaktieselskabet National* (*of Copenhagen*) (1), it seems to me that the bargain between the companies in this case has all the elements of reinsurance, of an acceptance by the National Company of a portion of the risks and an indemnification of the English Company against that portion of the risks in consideration of a money payment—namely, a payment based upon a corresponding proportion of the premiums received by the English Company. That case to which I have just referred was one in the Court of Appeal, and determined that a transaction which to my mind is in all material respects indistinguishable from the present was a transaction which involved the carrying on of a reinsurance business by a company which was sought to be made liable on the part of the Crown. In my judgment, therefore, the learned judge was perfectly right in taking the view that the obligations which were created as between these two companies by the agreement and by what took place under the agreement were honourable obligations of imperfect legal obligation. And although, no doubt, they would be recognized, as a great number of obligations of that kind are recognized in commercial circles, as between the two companies which are carrying on business and are not bound to limit the obligations which they honour to obligations that can be strictly enforced against them in a Court of law, yet when it comes to a question

(1) (1924) 40 Times L. R. 639, 641.

of proof in a winding up and when legal obligations only have to be considered, the result is that that which might have been given effect to as an honourable obligation is an obligation incapable of being proved for in the liquidation. I think the learned judge was right, and that the appeal should be dismissed.

LAWRENCE L.J. I agree. For the reasons stated by my Lords, with which I entirely concur and which I do not propose to repeat, I think that the learned judge was clearly right in coming to the conclusion that, on the proper construction of the agreement of 1922, it constituted in truth and in fact a contract for sea insurance. If that be so, this appeal must necessarily fail, and in my opinion it ought to be dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Parker, Garrett & Co.*
Solicitors for respondent: *William A. Crump & Son.*

W. I. C.

ASTBURY J.

1927

Nov. 17, 18.

In re MABER.

WARD *v.* MABER.

[1914. M. 1586.]

Law of Property—Accumulation—Period—Twenty-one Years from Testator's Death—Minority Accumulations arising during that Period—Minority Years not to be counted in that Period—Conveyancing Act, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 43—*Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 165.

A testator who died on November 6, 1893, gave his net residue (subject to certain life annuities which did not exhaust the income) in trust for a bachelor's children who should attain twenty-one with a gift over in default.

On March 11, 1896, North J. ordered the surplus income to be accumulated for twenty-one years from the testator's death—i.e., until November 6, 1914—or until the bachelor's previous death without leaving issue.

During this twenty-one years' period the bachelor married and died leaving three children, two of whom were still living. Temporary orders for maintenance were made.

On November 12, 1914, Neville J. declared that as from November 6, 1914, the two children then living were entitled to maintenance under s. 43, sub-s. 1, of the Conveyancing Act, 1881, but that notwithstanding sub-s. 2 [directing accumulations] any income not so applied passed as on an intestacy.

On July 20, 1927, the elder child attained twenty-one, and her contingent moiety vested in possession.

Up to this time Neville J.'s order had been acted on without complaint, but the question now arose whether, having regard to s. 165 of the Law of Property Act, 1925, it ought still to be acted on with regard to the younger child's contingent moiety:—

Held, that the effect of s. 165 was that the years of minority accumulation, which commenced during the twenty-one years' period, were not to be reckoned in ascertaining that period, and consequently that the income of the younger child's contingent moiety must in the first place be applied for her maintenance under s. 43, sub-s. 1, of the Conveyancing Act, 1881, and the balance could be validly accumulated under sub-s. 2.

Held, also, quite apart from s. 165, that the moment the elder child attained a vested interest as a member of the contingent class, there could be no question of intestacy as to any part of the capital or income.

In re Holford [1894] 3 Ch. 30, 46 applied.

SUMMONS.

By his will dated May 10, 1893, a testator after giving his wife a life annuity of 300*l.* and making a specific devise and bequest, devised and bequeathed his residuary real and

personal estate to his trustees upon trust for sale and conversion. He directed them to hold the net proceeds in trust out of the income to pay his wife's annuity and to pay his reputed son Frederick [then a bachelor] an annuity of 100*l.* until he attained twenty-one, and after that to pay him an annuity of 300*l.* for life, and after the decease of the testator's said wife and son in trust for the son's children who being sons should attain twenty-one or being daughters should attain that age or marry in equal shares, and if there should be only one such child, the whole to be in trust for that one child, with a gift over in the event of the son leaving no children him surviving who attained a vested interest.

The testator died on November 6, 1893.

The annuities did not exhaust the income, and by an order of March 11, 1896, made in a previous action—*In re Maber. Armsby* v. *Maber* (1894. M. 239)—North J. declared that the surplus income was part of the capital of residue and must be accumulated for a term not exceeding twenty-one years from the testator's death, expiring November 6, 1914, or until the death of the son during that period without leaving issue.

The son married on June 2, 1900, and died on April 12, 1911, leaving a widow Maude and three children, Olive, born February 1, 1904, and died August 24, 1912, Gladys, born July 20, 1906, and Joyce, born December 11, 1910. One other daughter Helen had died in infancy.

On December 4, 1911, Swinfen Eady J. allowed the three infants 450*l.* for maintenance until June 27, 1914, and on November 4, 1912, he continued that allowance notwithstanding Olive's death.

The present action was commenced on June 20, 1914, and by an order of November 12, 1914, Neville J. declared that under s. 43, sub-s. 1, of the Conveyancing Act, 1881, the trustees were entitled to apply the surplus income from November 6, 1914, for the maintenance of the two infants during their respective minorities or until marriage or further order, and that notwithstanding sub-s. 2 any income accruing during that period and not so applied passed as on an intestacy.

ASTBURY J. 1927 MABER, *In re.* WARD *v.* MABER.

The question of maintenance was referred to chambers, and on July 26, 1915, 400*l.* a year was allowed.

The testator's widow died on November 22, 1922, and her 300*l.* annuity ceased.

On February 3, 1923, Astbury J. allowed another 400*l.* a year for maintenance of the two children.

On July 20, 1927, Gladys attained twenty-one, and her contingent moiety vested in possession.

Gladys was admittedly entitled to one moiety of the trust fund and of the accumulations up to November 6, 1914, but the question arose: (*a*) whether she was also entitled to the income of Joyce's contingent moiety until it vested, or (*b*) whether the income of Joyce's contingent moiety was applicable wholly or in part for her maintenance, or (*c*) was divisible subject to such maintenance (if any) as on an intestacy, or (*d*) how otherwise the income of Joyce's contingent moiety ought to be dealt with.

On October 17, 1927, the trustees issued this summons to determine these and other points. The gross income of the moiety was about 1000*l.* a year.

H. S. G. Buckmaster for the trustees.

Baden Fuller for Gladys. If Joyce does not attain twenty-one I clearly take the whole of her moiety and accumulations, so far as not depleted by her maintenance. My interest in the whole fund is vested, so there can be no question of intestacy.

Robert Peel for Joyce. I entirely agree. Any possible suggestion that there is an intestacy as to the future accumulations is now removed by s. 165 of the Law of Property Act, 1925. This section provides that where accumulations of surplus income are made during a minority "under any statutory power or under the general law" the period for which such accumulations are made is not (whether the trust "was created" or the accumulations "were made" before or after January 1, 1926) to be taken into account in determining the periods for which accumulations are permitted to be made by s. 164 [which reproduces the

Thellusson Act], "and accordingly" an express trust for accumulation for any other permitted period shall not be deemed to have been invalidated or become invalid, by reason of accumulations "also having been made as aforesaid" during such minority.

The first part of the section is quite clear. The years of minority accumulation are not to be counted in ascertaining the twenty-one years' period. The minority accumulation commenced during that twenty-one years, so that that period is not yet finished. The accumulation is still lawful, and Joyce can stop it on her majority. There can therefore be no question of intestacy. The second part of the section beginning "and accordingly" is merely an illustration, and in no way limits the operation of the first part.

The section is new, and confirms the dicta in *Griffiths* v. *Vere* (1); *Tench* v. *Cheese* (2); and *Mathews* v. *Keble* (3): see Wolstenholme and Cherry's Conveyancing Statutes, 11th ed., p. 422; see also Underhill on Trusts, 8th ed., pp. 66, 67, where the first and second parts of the section are treated as distinct.

H. A. Hind for the persons claiming the unapplied income as on an intestacy. Sect. 165 is only dealing with past accumulations which "were made" before or after January 1, 1926, and this is borne out by the words "also having been made" in the final clause, which shows the intention of the whole section. These past accumulations may have been made because an infant could not give a receipt for vested income. These would of course not interfere with a special direction to accumulate. But in the case of accumulation of a contingent interest under s. 43 of the Conveyancing Act, 1881, that period would count.

The suggested construction might easily result in an accumulation for sixty-three years. Suppose Gladys had been born on November 5, 1914, just before the original twenty-one years ended, and Joyce were to be born on

(1) (1803) 9 Ves. 127, 136; Tudor's Real Property Cases, 4th ed., pp. 618, 624.

(2) (1855) 6 D. M. & G. 453, 463.

(3) (1868) L. R. 3 Ch. 691, 696.

ASTBURY J. 1927 MABER, *In re.* WARD *v.* MABER.

November 4, 1935, just before the class closed on Gladys's majority. In that case the whole income would be accumulated for the original twenty-one years less one day, and then during Gladys's minority, and then again a moiety of the income would be accumulated during Joyce's minority. This practically makes a period of sixty-three years—namely, twenty-one years under s. 164, sub-s. 1 (*b*), and forty-two years' minority accumulation under sub-s. 1 (*d*). But as s. 164 expressly forbids two periods, it is inconceivable that s. 165 should virtually authorize them.

Apart from s. 165 the accumulation of income unapplied for maintenance became invalid on November 6, 1914, and the unapplied income passed as on an intestacy. This is clear from Neville J.'s order of November 12, 1914, and from *In re Holford.* (1)

Baden Fuller in reply. Even if s. 165 does not apply, there can be no question of intestacy, as Gladys, a member of the class, has attained twenty-one. *In re Holford* (1) was only dealing with the rights of the members of the class inter se, but Lindley L.J. clearly negatived any claim as on intestacy when once a share had vested. (2)

ASTBURY J. [after stating the facts:] I will assume that Neville J.'s order of November 12, 1914, was right according to the law then existing, and that as from November 6, 1914, when the twenty-one years' period expired, the surplus income unapplied for maintenance passed as on an intestacy.

But the law is now declared by the Law of Property Act, 1925, s. 165. [His Lordship read the section.] It may be that the section is difficult to construe, but in my view the first portion effects the following result—namely, that if during a minority income is accumulated under a statutory power, e.g., s. 43 of the Conveyancing Act, 1881, the period of that minority accumulation is not to be taken into account in ascertaining the allowable Thellusson period in the particular case. In other words the years of minority accumulation are not to be reckoned in that period.

(1) [1894] 3 Ch. 30, 41, 45. (2) [1894] 3 Ch. 46.

Applying that to this particular case: At the testator's death there was undisposed of residuary income to which no person then alive was entitled. An accumulation for possibly twenty-one years from the testator's death was then properly commenced. But during that period the two children now living were born. Being entitled to contingent interests in residue, they were entitled to maintenance under s. 43, sub-s. 1, of the Conveyancing Act, 1881, and the trustees were bound to accumulate the unapplied income under sub-s. 2 and hold the accumulations for the persons ultimately entitled to the property from which they arose.

Now this minority period having commenced within the twenty-one years from the testator's death is by virtue of s. 165 not to be reckoned in counting those twenty-one years. In this particular case the twenty-one years will never in fact be completed, as Joyce will obviously stop any accumulation after her majority.

At the time Neville J. made his order s. 165 had not been passed, and his order was acted on until July 20, 1927, when Gladys attained twenty-one. I must now make a different order, having regard to s. 165.

The persons claiming as on intestacy say that my construction of this section is wrong, but I am unable to take their view. In my opinion the first part of the section is perfectly clear and the second part beginning "and accordingly" is only by way of illustration, and in no way limits the general operation of the first part.

The matter does not however end there. Even if the persons claiming as on intestacy were right on s. 165, they would still have no title, as Gladys's share is already vested, and if Joyce does not attain a vested interest, Gladys is entitled to the entire residue. If Joyce does attain a vested interest she gets her own moiety plus its accumulations.

The persons claiming as on intestacy contend that as from November 6, 1914, when the twenty-one years' period ceased, they are entitled to the income of Joyce's contingent moiety not applied for her maintenance. They rely on *In re*

ASTBURY J. 1927 MABER, *In re.* WARD *v.* MABER.

Holford (1), where the limitations were practically identical with those before me. In that case a testator gave his residuary personalty upon trust to divide it equally between such of the children of his brother, Thomas Holford, living at the testator's death as should attain twenty-one. At the testator's death his brother had six children, all infants. The will contained no maintenance clause. The first child who attained twenty-one claimed one-sixth of the capital, and also, until another child attained twenty-one, the income of the remaining five-sixths. It was held by Chitty J. and the Court of Appeal that the income of the remaining five-sixths did not belong to the adult child, but was applicable under the Conveyancing Act, 1881, s. 43, for the maintenance of the five infants. There was no suggestion that there was any intestacy. Chitty J. said (2): "I hold, therefore, that the eldest daughter is entitled to receive her sixth share of the original capital and of the accumulated fund and income down to the time of her taking a vested interest, but not to the income of the remaining five-sixths of the original capital and accumulated fund during the suspense of vesting. This income is applicable during the suspense to the maintenance of the infants. My opinion would have been the same if the class had been liable to increase after the testator's death, subject to this exception—that the class would have closed on the eldest child attaining a vested interest." Lindley L.J. said (3): "The fund is given to all the children alike. As each attains twenty-one he becomes absolutely entitled to one-sixth; he and the other children are still contingently entitled to the remaining unvested shares; but no child who has attained twenty-one is entitled to a vested interest in more than one-sixth until his share is increased by the death of one or more of the other children under twenty-one. This is as true of the income as of the capital, and is in accordance with common sense and justice." Later on he said (4): "In this case we have no concern with any one who is not a member of the class to whom the gift

(1) [1894] 3 Ch. 30.
(2) [1894] 3 Ch. 41.
(3) [1894] 3 Ch. 45.
(4) [1894] 3 Ch. 46.

is made. That class cannot now wholly fail, for one child has attained twenty-one, and, if all the other members of the class die under twenty-one, the child who has attained twenty-one will take the whole fund absolutely. There is good sense in saying that the income of property given contingently to a class of persons belongs to its members for the time being, as against persons who are only entitled if and when the class ceases to exist; but there is no sense in saying that one of a class takes the whole income, in which other persons belonging to the same class have already a contingent interest which may become absolute."

Applying these judgments it follows that the income of Joyce's contingent moiety must in the first place be applied for her maintenance, and secondly, that the balance must be accumulated under the Conveyancing Act, 1881, s. 43, sub-s. 2. That is sufficient to answer this part of the summons, but I should like to add that if I had taken a different view of the effect of s. 165 and in *In re Holford* (1) I should have given Joyce liberty to apply for increased maintenance. At present she is willing to accept 400*l.* a year net, which is in effect her present allowance. Otherwise I should have given her liberty to apply.

Solicitors: *Dixons, Ward, Umney & Burdon.*

(1) [1894] 3 Ch. 30.

G. R. A.

ASTBURY J.
1927
Nov. 25.

In re HANSON.

HANSON *v.* EASTWOOD.

[1927. H. 2151.]

Law of Property—Will—Personalty Settlement—Residence for Widow—Direction to purchase—Whether held on Trust for Sale—Contrary Intention —"Unless the settlement otherwise provides"—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *ss.* 25, 32.

By a personalty settlement created by his will, a testator directed his trustees to purchase a house as a residence for his wife until his son David attained twenty-five, if she so long continued the testator's widow. After David attained twenty-five or the wife remarried (whichever first happened) the house was to fall into the residuary estate, which was given to the trustees on trust for sale and conversion.

After the testator's death a house was purchased and assured to the wife and the other trustees in fee simple. It was now desired to sell it, and the question arose whether a title could be made under the trust for sale which "unless the settlement otherwise provides" is imported by s. 32 of the Law of Property Act, 1925, or whether the title must be made under the Settled Land Act, 1925 (15 Geo. 5, c. 18):—

Held, that the direction that the house was to be purchased for the wife's residence was inconsistent with an immediate trust for sale, and amounted to a provision excluding s. 32 of the Law of Property Act, 1925, so that there was no trust for sale, and the title must be made under the Settled Land Act, 1925.

Whether s. 32 applies to a trust to purchase land, quaere.

ORIGINATING SUMMONS.

By his will dated October 15, 1920, a testator, after appointing his wife and three other persons executors and trustees, directed his trustees as soon as possible after his death to purchase such a dwelling-house as his wife should select as a residence for herself until the testator's son David (born February 28, 1917) should attain twenty-five, if she should so long continue the testator's widow, she paying the rates, taxes and outgoings payable by the owner in respect thereof. The testator then declared that after David attained twenty-five or the second marriage of the testator's wife (whichever first happened) the said dwelling-house should fall into and form part of the testator's residuary estate, which was thereinafter devised and bequeathed to the trustees upon trust for sale and conversion.

The testator died on November 4, 1920.

In 1922 the trustees purchased a freehold house "Burniston" as a residence for the testator's widow for 3700*l.*, and by a conveyance on sale, dated March 31, 1922, it was assured to the trustees in fee simple.

The only other estate of the testator consisted in shares in a private limited company, the value of which it was difficult to estimate.

"Burniston" being rather too large for the widow she had recently contracted as a person with life tenant powers to sell it for 3510*l.*

The question arose (*a*) whether under s. 32, read with s. 25 of the Law of Property Act, 1925, "Burniston" was held upon trust for sale with power to postpone, and if not so held, (*b*) whether the will created or was a settlement of "Burniston" for the purposes of the Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 1, (*c*) whether "Burniston" was settled land within s. 2, (*d*) whether the widow was a life tenant of "Burniston" under s. 19, or had life tenant powers under s. 20, and could convey an estate in fee simple absolute in possession in "Burniston" free from incumbrances and freed from all equitable interests or powers, and (*e*) whether the widow and the other surviving trustee were Settled Land Act trustees under s. 30, sub-s. 1, cl. IV.

On July 6, 1927, the widow issued this summons to determine these points.

W. F. Waite for the widow. Sect. 32 of the Law of Property Act, 1925, provides that where a settlement of personal property or of land held upon trust for sale contains a power to invest money in the purchase of land, such land shall "unless the settlement otherwise provides" be held by the trustees on trust for sale. Sect. 25 provides that a power to postpone sale shall, in the case of every trust for sale of land, be implied "unless a contrary intention appears." These sections virtually reproduce s. 10 of the Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), but there is no authority on that section.

ASTBURY J.
1927
HANSON, *In re.*
HANSON *v.* EASTWOOD.

The only real question is whether s. 32 applies. The other questions are purely subsidiary and raise no difficulty. "Unless the settlement otherwise provides" means that the section will have effect in every case in which it is not excluded, either expressly or by necessary implication: see Wolstenholme and Cherry's Conveyancing Statutes, 11th ed., p. 187.

Now here the land purchased is to be a dwelling-house for the widow's residence. How is that compatible with an immediate trust for sale enabling the house to be sold over her head? The section is clearly excluded by necessary implication. There is therefore no trust for sale, and the Settled Land Act, 1925, applies.

Henry Johnston for the other surviving trustee and the residue. I admit that s. 32 may be excluded by necessary implication. For instance, if the will had directed that the house when purchased should be held in trust for the widow for her widowhood with a remainder in fee it would no doubt "otherwise provide": see Wolstenholme and Cherry's Conveyancing Statutes, 11th ed., p. 187. This is really clear, because with such limitations the property would clearly be intended to be held as real estate, and not on trust for sale.

But no such implication arises from the direction to purchase a house for the widow's residence. She is one of the trustees, with full power to postpone sale, and though no doubt both trustees must concur in exercising the power of postponement, no Court would allow the other trustee to insist on selling against the widow's wish.

Sect. 32 and its predecessor s. 11 of the Conveyancing Act, 1911, are merely statutory adoptions of the ordinary conveyancing practice under which land or a residence allowed to be purchased by the trustees of a personalty settlement was always directed to be assured to the trustees upon trust for sale.

ASTBURY J. [after stating the facts:] The main question is whether "Burniston," bought by the trustees as a residence

for the widow until David attained twenty-five or she remarried, is held on trust for sale, so as to exclude the Settled Land Act, 1925. This depends on the question whether there is any contrary intention within s. 32 of the Law of Property Act, 1925, which read with s. 25 reproduces s. 10 of the Conveyancing Act, 1911. [His Lordship read ss. 32 and 25.] The only question therefore is whether the will settlement "otherwise provides."

Now I am not aware of any decision on s. 10 of the Conveyancing Act, 1911, but I imagine that the testator's direction to the trustees to purchase a dwelling-house for the widow's residence until David attained twenty-five or she remarried is inconsistent with there being an immediate trust for sale. Such a trust for sale would no doubt oust the Settled Land Act, 1925. But in my view the testator has otherwise provided within s. 32 of the Law of Property Act, 1925. He could not have intended that a dwelling-house, expressly directed to be purchased for the widow's residence, should be liable to be sold over her head.

Perhaps I ought to add that this case has been argued on the footing that, apart from a contrary intention, s. 32 applies to this direction to purchase, though obviously more in the nature of a trust than a power. Whether that assumption is correct or not has not been argued, and I do not decide it. I merely decide on this point, that s. 32, if prima facie applicable to the present case, is excluded by a contrary intention.

There will be a declaration that there is no trust for sale, but that the will creates a settlement under s. 1 of the Settled Land Act, 1925, and "Burniston" is settled land under s. 2; that the widow has life tenant powers under s. 20 and can convey the fee simple absolute in possession free from incumbrances and freed from all equitable interests or powers; and that the widow and the other surviving trustee are Settled Land Act trustees under s. 30, sub-s. 1, cl. IV.

Solicitors: *Williamson, Hill & Co., for Clarkson, Thomas & Collinson, Halifax.*

G. R. A.

ASTBURY J.

1927

Nov. 30; *Dec.* 15.

In re MYHILL.

HULL *v.* MYHILL.

[1927. M. 3216.]

Law of Property—Transitional Provisions—Freehold Land—Undivided Shares—Three Shares settled—Life Tenants and Remaindermen—One Share absolute—Entirety vested in single personal Representative of last surviving Trustee—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *Sch. I., Part* 4, *para.* 1, *sub-para.* 1.

Immediately before the commencement of the Law of Property Act, 1925, certain freehold land stood vested in J. as personal representative of the last surviving trustee of a will in trust as to three undivided fourths for three life tenants with remainders to their respective children and as to one-fourth for a deceased life tenant's children absolutely :—

Held, that although there was only one trustee or personal representative and three of the persons entitled in undivided shares were only life tenants, the case fell within sub-para. 1 of para. 1 of Sch. I., Part 4, of the above Act, so that J. held the land upon the statutory trusts, and on appointing a new or additional trustee to act with him, he and the new or additional trustee could make a good title and give a good receipt to a purchaser.

ORIGINATING SUMMONS.

Under the will of a testator who died on January 20, 1872, and in the events that happened, and by virtue of s. 30 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), certain freeholds in December, 1925, stood vested in the testator's son John as personal representative of the last surviving trustee in trust as to one-fourth for John for life with remainder to his children, as to one-fourth for the testator's daughter Jane for life with remainder to her children, as to one-fourth for a daughter Florence for life with remainder to her children, and as to the remaining fourth for a deceased daughter Mary's children absolutely.

In 1898 John, as such personal representative, acting under s. 10 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), had purported to appoint himself and the plaintiff trustees of the will and Settled Land Act trustees, and made the usual vesting declaration. The new trustees had acted accordingly, but it was admitted at the hearing that, as John had appointed

himself a co-trustee, the appointment was wholly inoperative. Until, however, new trustees were appointed John was entitled to act as trustee under the Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 8, sub-s. 1, now replaced by the Trustee Act, 1925 (15 Geo. 5, c. 19), s. 18, sub-s. 2.

ASTBURY J. 1927 MYHILL, *In re.* HULL *v.* MYHILL.

As the property was held in equity in undivided shares the question arose in whom, having regard to Sch. I., Part 4, of the Law of Property Act, 1925, the legal estate was now vested and how a title could be made.

On October 20, 1927, the plaintiff issued this summons to determine the above and other points.

B. F. Mendel for the plaintiff. Sch. I., Part 4, para. 1, provides that where immediately before January 1, 1926, land is held at law " or in equity " in undivided shares vested in possession the following provisions shall have effect.

Sub-para. 1 provides that if the entirety of the land is vested in " trustees or personal representatives " in trust for " persons entitled in undivided shares " then (*b*) the land [not being subject to incumbrances within (*a*)] shall be held by " such trustees or personal representatives " upon the statutory trusts—namely (s. 35), " upon trust to sell the same and to stand possessed of the net proceeds of sale " upon the trusts therein declared.

Now here there is only one trustee or personal representative, and having regard to s. 27, sub-s. 2, as amended by the Law of Property (Amendment) Act, 1926 (16 & 17 Geo. 5, c. 11), Schedule (1926 Statutes, p. 62), he cannot carry out the statutory trusts, because he cannot by himself receive or apply the purchase money. This is a sufficient contrary intention to prevent the plural including the singular under the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 1, sub-s. 1 (*b*), and sub-para. 1 is therefore inapplicable. Sub-para. 2 obviously does not apply, and sub-para. 3 does not apply, because the entirety is not settled land. The property is therefore vested in the Public Trustee under sub-para. 4.

There is another serious difficulty. If the entirety were settled the case would fall within sub-para. 3, although the

ASTBURY J. 1927 MYHILL, *In re.* HULL *v.* MYHILL.

legal estate was vested in trustees: *In re Higgs' and May's Contract.* (1)

[ASTBURY J. The point was not raised or argued there.]

No. It was tacitly assumed that sub-para. 3 and sub-para. 1 were mutually exclusive. But that can only be so if sub-para. 1 is confined to absolute interests.

[ASTBURY J. If, as you admit, this case falls within the introductory words of para. 1 it must fall within sub-para. 1.]

No. The words "held in undivided shares vested in possession" are satisfied by life tenancies in possession. But those life tenants are not necessarily "persons entitled in undivided shares" within sub-para. 1. The Court cannot ignore sub-para. 3, although it does not actually apply here.

Stafford Crossman for John. Property can clearly vest in one trustee on the statutory trusts, though no doubt he must appoint a co-trustee before he can effectually exercise them. There is no difficulty here. John now holds on the statutory trusts, and can appoint a new trustee to act with him, or if he prefers he can now appoint himself and a new trustee under s. 36, sub-s. 1, of the Trustee Act, 1925.

Again, sub-para. 1 is not confined to persons "absolutely" entitled in undivided shares. It includes life tenants. Where the Schedule means "absolutely entitled" it says so, as in sub-para. 2, which uses the expression "vested absolutely and beneficially" in not more than four adults "entitled thereto in undivided shares."

Eardley-Wilmot for the testator's grandchildren. It is generally considered that the four sub-paragraphs are mutually exclusive. Now sub-paras. 1 and 3 can be made mutually exclusive in two ways. The first way is to read sub-para. 1 as confined to absolute interests, and sub-para. 3 as including all cases where the entirety is settled land. The second way is to read sub-para. 1 as including all cases where land is vested in trustees in trust for persons entitled to absolute or limited interests in undivided shares, and to confine sub-para. 3 to cases where the land is not vested in trustees at all, but is settled on legal limitations. The second way is

(1) [1927] 2 Ch. 249.

contrary to *In re Higgs' and May's Contract* (1), though admittedly the point was not argued. The exact point does not arise here, as the entirety is not settled land and sub-para. 3 does not apply. But if the Court holds that sub-para. 1 is not confined to absolute interests, it will be difficult to avoid a cross division in a case where sub-para. 3 does apply.

ASTBURY J., [after stating the facts :] There is no question that Sch. I., Part 4, applies to this case, as, immediately before the Act, the land was held in equity in undivided shares vested in possession, three shares being held for three life tenants, and the remaining share for a deceased life tenant's children absolutely.

The real question is which of the sub-paras. 1, 3 or 4 applies, sub-para. 2 being clearly inapplicable.

Sub-para. 1 provides that if the entirety of the land is vested in " trustees or personal representatives " in trust for " persons entitled in undivided shares " then (*b*) (omitting (*a*), as the land is unincumbered) the land shall be held by " such trustees or personal representatives " upon the statutory trusts, i.e., the trust for sale and application of the proceeds under s. 35.

The first question is whether this sub-paragraph applies to the case of land vested in one trustee or one personal representative.

Now under the Interpretation Act, 1889, s. 1, sub-s. 1 (*b*), the plural includes the singular unless a contrary intention appears. It is suggested that s. 27, sub-s. 2, which as amended by the 1926 Act provides that proceeds of sale " shall not be paid to or applied by the direction of fewer than two persons as trustees for sale " shows a sufficient contrary intention. But that merely prevents the proceeds of sale being paid to or applied by fewer than two trustees. It does not touch the vesting provisions of sub-para. 1, though no doubt the statutory trusts cannot be effectually performed until a new trustee is appointed. There is therefore no contrary intention to prevent the vesting in a single trustee or personal representative.

(1) [1927] 2 Ch. 249.

ASTBURY J. 1927 MYHILL, *In re.* HULL *v.* MYHILL.

The next question is whether the entirety of the land is vested in John in trust for "persons entitled in undivided shares." It is suggested that this means persons absolutely so entitled, but I do not think that is the true construction, and my view is borne out by sub-para. 2, which provides that if the entirety of the land (not being settled land) is "vested absolutely and beneficially" in not more than four persons of full age "entitled thereto in undivided shares" it shall vest in them as joint tenants upon the statutory trusts. This shows that the words "entitled in undivided shares" are used in the general sense of having a present interest in undivided shares and do not mean "absolutely entitled."

In my opinion sub-para. 1 applies to the persons entitled to the "undivided shares vested in possession" spoken of in para. 1, which admittedly applies to this case, three of those persons being life tenants in possession, and the fourth class being absolutely entitled in possession. Sub-para. 1 therefore applies. Sub-para. 2 is clearly inapplicable, and sub-para. 3 does not apply, because the entirety of the land is not settled land. Three-fourths of the land is settled land; the remaining fourth is not settled at all, but held absolutely.

It is suggested that if sub-para. 1 is not confined to absolute interests, but extends to life interests, it would also apply to a case where the entirety of the land though vested in trustees was settled land, and would then clash with sub-para. 3. Such a question—namely, a possible conflict between sub-para. 1 and sub-para. 3—may be a difficult question to decide when it arises. But it does not arise here. The entirety is not settled land and sub-para. 3 has no application. Sub-para. 4 does not apply, as the case falls within sub-para. 1.

There will therefore be a declaration that the land is held by John on the statutory trusts, and on the appointment of a new or additional trustee to act with him he and the new or additional trustee can make a good title and give a good receipt to a purchaser.

Solicitors: *Horsley & Weightman; Maude & Tunnicliffe.*

G. R. A.

In re HARRINGTON MOTOR COMPANY, LIMITED.

Ex parte CHAPLIN.

C. A.
1927
EVE J.
July 5.
C. A.
Nov. 10, 11.

[0038 of 1927.]

Company—Winding up—Proof—Personal Injury caused by Negligence of Company's Servant—Company insured against Third Party Risks—Judgment for Damages and Costs against Company—Subsequent Liquidation of Company—Payment by Insurers to Liquidator of Damages and Costs—Claim by Person injured to Money so paid—Money available for Distribution among general Creditors in winding up.

The applicant recovered judgment for damages and costs in an action against a limited company for personal injuries caused to him by the negligence of one of its servants. Before execution could be levied the company went into liquidation, and the insurance company with which the company in liquidation was insured against third party risks paid the amount of the damages and costs to the liquidator :—

Held (affirming the decision of Eve J.), that the applicant had no right at law or in equity either as against the insurance company or as against the liquidator to require that the money so paid should be handed over to him ; but that the money formed part of the assets of the company, available for distribution among its general creditors in the winding up, including the applicant.

Dicta in *Liverpool Mortgage Insurance Co.'s Case* [1914] 2 Ch. 617, 633, 639 applied.

In re Richardson [1911] 2 K. B. 705 discussed and distinguished.

SUMMONS.

This was a summons taken out by Walter Chaplin in the winding up of the Harrington Motor Company, Ld., against the liquidator for relief under the following circumstances :—

On January 28, 1927, the applicant recovered judgment against the company for 324*l.* damages for injuries which he had received by being knocked down in the street by a motor belonging to the company, together with the costs of the action. Those costs had been taxed at the sum of 217*l.* 13*s.* 5*d.*, and the total sum, therefore, which the applicant was entitled to receive from the company for debt and costs was 541*l.* 13*s.* 5*d.* The judgment was given on January 28, 1927, but an appeal was facilitated in this sense, that a stay of execution was granted for a period of ten days upon the condition that the appeal was entered within

C. A. 1927

HARRINGTON MOTOR CO., *In re.* CHAPLIN, *Ex parte.*

fourteen days. The result of that was that the applicant was not free at the moment when the judgment was given to issue execution against the company, and before the time expired during which that stay operated, a petition for liquidation was presented by the company, and on February 15 an order was made for its compulsory winding up.

At the time when this accident happened the company was insured by the Universal Automobile Insurance Company, Ld., and the policy provided that, in the event of damage or of a loss occurring, the assured should be paid by the insurance company all sums which the assured would be legally liable to pay by way of compensation, and also, in addition, the insurance company should pay all costs recovered by any claimant against the assured. Under the terms of that policy a demand was made in respect of this sum for debt and costs which had been recovered by the applicant, and on April 14, 1927, the insurance company paid a sum to the liquidator, which was arrived at in the following way. There were at that moment certain premiums which had not been paid up by the company, and therefore there was a cross-claim for moneys due to the insurance company for outstanding premiums. After the amount due for those premiums had been deducted there was left a balance of 420*l.* 3*s.* 10*d.* due from the insurance company to the company, and on April 14 that sum was paid over to the liquidator of the company.

The applicant by his summons (inter alia) asked for: (1.) a declaration that the 420*l.* 3*s.* 10*d.* paid to the liquidator in the circumstances above stated did not form part of the assets of the company available for distribution among the creditors in the winding up; (2.) a declaration that the fund was charged in the hands of the liquidator to secure payment to the applicant of 541*l.* 13*s.* 5*d.*, being as to 324*l.* the amount of the damages, and as to 217*l.* 13*s.* 5*d.*, the amount of the costs for which judgment was obtained in the action; and (3.) an order on the liquidator to pay over to the applicant the 420*l.* 3*s.* 10*d.* or such other sum as had been or should be paid to the liquidator in respect of the applicant's claim.

The summons was heard before Eve J. on July 5, 1927.

W. N. Stable for the summons. This case comes within the principle of *In re Richardson* (1), where there was an equitable obligation, but one not enforceable at law. That is so in the present case; there is no legal right that can be enforced under the circumstances. There is a right to indemnity, and the amount claimed is recoverable from the liquidator: *Bristol Union and National Insurance Co.* v. *Rawson.* (2)

There are two cases which may be relied upon by the liquidator—namely, *Liverpool Mortgage Insurance Co.'s Case* (3), and *Godson's Claim* (4) — but these are, it is submitted, distinguishable from the present. There is an equity here attached to these moneys in the hands of the liquidator, and the Chancery Division, being a Court of equity, has jurisdiction to enforce this equity by directing the liquidator to pay them to the applicant and not to treat them as distributable among the general creditors. The Court has also a discretion to give leave to the applicant as a judgment creditor to levy execution after the date of the winding-up order.

[He also referred to *Ex parte James* (5) as an instance of the Court having jurisdiction to relieve when a mistake had been made.]

H. C. Bischoff for the liquidator. The applicant here is only entitled to share in this money with the other creditors. The judgment was obtained before the date of the liquidation, but no execution had been levied, and the applicant has no right in law or in equity as against the liquidator who stands in no fiduciary position to the applicant. The law is really settled by *Liverpool Mortgage Insurance Co.'s Case* (3) and *Godson's Claim.* (4) Here there is no fiduciary relationship between the parties, and therefore no question arises of a trustee making a profit out of his trusteeship. Another example of the general rule as to the distribution of assets amongst all creditors pari passu is *Anglo-Baltic and Mediterranean Bank* v. *Barber & Co.* (6), and there must be very exceptional

(1) [1911] 2 K. B. 705.
(2) [1916] 2 Ch. 476.
(3) [1914] 2 Ch. 617.
(4) [1915] 1 Ch. 340.
(5) (1874) L. R. 9 Ch. 609.
(6) [1924] 2 K. B. 410.

C. A. 1927

HARRINGTON MOTOR CO., *In re.*

CHAPLIN, *Ex parte.*

circumstances to take the case out of the general rule. No leave now to issue execution should be given, although it may seem a hard case on the applicant.

W. N. Stable in reply.

EVE J. This case has given rise to an interesting discussion, but, in my opinion, the question involved in it is concluded by authority. On January 28 last the applicant recovered judgment against the respondent company for a sum of 324*l.* damages for personal injuries caused by the negligence of a servant of the company, and his costs, amounting to 217*l.* 13*s.* 5*d.*, the total sum for which judgment was recovered being therefore 541*l.* 13*s.* 5*d.* Stay of execution was granted with a view to an appeal, and during the respite a petition for the winding up of the company was presented on January 31, 1927, and fifteen days later the order for winding up was made. It appears that prior to the accident the company had insured themselves against such claims, and the insurance company, on being notified of the accident, undertook the conduct of the litigation initiated by the plaintiff, defended the action to judgment, and obtained the stay. Shortly afterwards they paid to the liquidator 420*l.* 3*s.* 10*d.*, representing the 541*l.* 13*s.* 5*d.* for which the plaintiff had recovered judgment less 121*l.* 9*s.* 7*d.* for arrears of premiums owing by the company. The liquidator has in hand the 420*l.* 3*s.* 10*d.*, and the question I have to decide is whether the plaintiff is entitled to have that sum paid over to him or whether it constitutes assets available for the general body of the company's creditors? The plaintiff's claim is put forward on the ground that there is, or should be, an equity binding the liquidator to apply the moneys towards satisfying the liability in respect of which they have come to his hands and not the less because they are insufficient to give the plaintiff the full compensation to which he has been held to be entitled. I fail to see how any such equity can be raised. The liquidator, as recipient of the fund, stands in no fiduciary relation to the plaintiff. The money has been recovered under a contract made between the

company, and the insurers, to which the plaintiff was not and could not in the circumstances have been a party; he has no concern and was not in any way connected with the company and, indeed, probably did not know of its existence until its vehicle inflicted these injuries upon him. In these circumstances neither the company nor the liquidator can be treated as a trustee for him in enforcing the claim against the insurers. The decision in *In re Richardson* (1) is relied upon as supporting the plaintiff's contention. I do not think it does. In that case a husband was trustee for his wife of certain leasehold properties. The reversioners recovered judgment against him for arrears of rent and damages for breach of covenant. He was adjudicated a bankrupt. By virtue of the relationship of cestui que trust and trustee subsisting between the wife and her husband she was liable in equity to indemnify him and his estate against the judgment debt, and certain moneys having been provided by her in satisfaction of this debt the question arose whether such moneys were payable to the reversioners or to the trustee in the husband's bankruptcy. The Court held the former to be entitled on the short ground that if the moneys were applied in satisfying wholly or in part the claims of the husband's general creditors, the husband would be making a profit out of his trusteeship. The husband could not use the indemnity arising not by contract but out of the relationship of him and his wife for his own benefit or for the benefit of his creditors generally, or indeed for any purpose other than bringing about payment to the reversioners of the particular debt against which the husband was indemnified, and the trustee in bankruptcy was in no better position. I do not think that decision or the reasoning on which it is founded has any application to the facts of the present case. Here the right of the company to be indemnified was created by a contract to which the plaintiff is no party, and I cannot see upon what ground he can be held to have any valid claim either at law or in equity to the moneys in the hands of the liquidator.

(1) [1911] 2 K. B. 705.

C. A. 1927 — HARRINGTON MOTOR CO., *In re.* — CHAPLIN, *Ex parte.* — EVE J.

It was argued that in the circumstances of hardship existing in this case the Court might give the plaintiff leave to issue execution for the debt, notwithstanding the winding-up order. Apart from the question whether the Court has any jurisdiction to make such an order I do not think the facts here disclosed would justify it. It is not a case in which the company has been guilty of such misconduct as occasionally results in the Court refusing a stay under s. 140 of the Companies Act, and in my opinion the hardship inflicted on the plaintiff cannot be regarded as special circumstances entitling him to more favoured treatment at the expense of the creditors generally.

The result is, although I sympathize with the plaintiff, I have no alternative but to dismiss his summons; but unless the liquidator thinks it his duty to press for them, I do not think it is a case where I ought to make him pay the costs. It is a matter upon which I think he was justified in taking the opinion of the Court. I propose therefore to make no order on the summons as to costs or otherwise. The liquidator's costs will come out of the assets.

G. M.

C. A.

The applicant appealed. The appeal was heard on November 10 and 11, 1927.

W. N. Stable for the appellant repeated in substance the arguments used by him in the Court below.

H. C. Bischoff for the liquidator was not called upon.

LORD HANWORTH M.R. This case comes before us on appeal from Eve J., and it is necessary to state the facts. [His Lordship stated them and continued:] Now I think it is quite clear that most people would think that there ought to be a right on the part of Mr. Chaplin to recover the sum which had been paid to the defendants in the action on the strength of the liability under which they had been placed to him, and that this sum of 420*l.* which was received by the liquidator, inasmuch as it had been paid into the hands of the liquidator in respect of

the debt and costs for which a judgment had passed in favour of Mr. Chaplin, was so much earmarked that it ought to be paid to Mr. Chaplin. In that view he took out a summons on June 8, 1927, first for a declaration that the fund which had been received into the hands of the liquidator was charged as to the amount that would cover the damages awarded to him, and as to the balance for the costs which he had been authorized to receive from the company, secondly for an order for the liquidator to pay over the amount which he had received, 420*l.* 3*s.* 10*d.*, in satisfaction or in part satisfaction of the judgment which Mr. Chaplin had secured on January 28. On July 5 Eve J. dismissed that summons, and on July 21 a notice of appeal from Eve J.'s decision was given, and that is the appeal with which we have now to deal.

In spite of a strenuous and able and, I may add, helpful argument on the part of Mr. Stable, we feel compelled to dismiss this appeal, and to hold that the decision of Eve J. was right. It is, perhaps, unfortunate that one should have to give a judgment which would, at first sight, appear to run counter to what I might call the common-sense view of the proceedings. None the less it is necessary for us to administer the law as it stands, and if any alteration is to be made in it that must be made by the proper authorities and by the proper means.

Now we have to consider whether or not there is such a right on the part of Mr. Chaplin to this fund so received by the liquidator that he can come and say to the liquidator: "This money in your hands is really my money and you ought not to distribute it to the general creditors of the Harrington Motor Company, Ld." On careful consideration of the authorities I would only say that that view, however cogent it might at first sight appear, is untenable. The company had insured themselves against what are commonly called third party risks with the Universal Automobile Insurance Company, and they had paid the premiums. The liquidation of a company or the bankruptcy of an individual bars the right of a creditor to proceed any further against the

C. A. 1927

HARRINGTON MOTOR CO., *In re.* CHAPLIN, *Ex parte.*

Lord Hanworth M.R.

company or the bankrupt. Sects. 7 and 9 of the Bankruptcy Act, 1914, provide that there shall be a stay of any further proceedings, whether in an action or by way of execution, against the bankrupt or the company in liquidation, and under s. 30 provision is made for the proof of a debt from the company or from the bankrupt. It is true that demands in the nature of unliquidated damage arising other than by reason of breach of contract, promise or trust, are not provable, and an attempt was made to make something of that in the sense that this claim in tort for unliquidated damages was, in its nature, one which could not be the subject of a proof in bankruptcy. It does not appear to me, however, that that affords any solution of the present difficulty. We have to consider whether or not Mr. Chaplin has any right over against the insurance company in respect of this money which they have paid to the liquidator.

Now the matter has been considered in a number of cases, but I think the shortest statement can be found as to that point in an observation by Scrutton J. (as he then was) in *Liverpool Mortgage Insurance Co.'s Case.* (1) Speaking of the rights of debenture holders who had been insured, Scrutton J. says (2): "There is, however, no direct privity between the debenture-holder or principal debtor . . . . on the one hand and the insurance company on the other," and if one resolves the position of the parties into their true legal perspective the case really stands in this way. Mr. Chaplin cannot proceed further to execution of his judgment, whether for debt or for costs, because the bankruptcy has imposed a definite bar to further procedure. The Bankruptcy Act has also provided a system whereby the trustee or liquidator, as the case may be, gets in the estate of the bankrupt or the company, and then distributes that estate for the benefit of all the creditors rateably according to their equal rights. As I have said, Mr. Chaplin's action for execution is stopped by the bankruptcy. He has then a right to come in and prove in the liquidation. But what is the right which the liquidator has to receive this

(1) [1914] 2 Ch. 617. (2) [1914] 2 Ch. 647.

money? It is not really true to say that it is due to the action of Mr. Chaplin. The occasion of the loss in respect of which the insurance company has paid is that Mr. Chaplin suffered an accident in the street. But the reason why the insurance money is paid to the liquidator is that over a period of time the company, now represented by the liquidator, have made an independent contract of their own and paid their own money to the insurance company, so that, if and when a liability on their part arose, there should be paid to them a certain sum of money. Supposing the defendants in the action brought by Mr. Chaplin were solvent? Then the money which would be payable to Mr. Chaplin would have been paid out of any sums which the defendants liked to appropriate to that purpose. They need not pay over the actual sum received from the insurance company; they could pay out of their own resources and in such way as they pleased. Does the bankruptcy give any fresh right to the creditor to follow through the bankruptcy the sum which is paid in respect of this loss by the insurance company to the debtors? It appears to me that that cannot be maintained. There is an absolute break in the relationship between the creditor who has suffered the accident and the insurance company, and there cannot be a privity under which, when the bankruptcy or liquidation supervenes, you can cancel out the defendants and then say that a privity arises between the creditor and the insurance company and that the latter has to make good this principal sum to the former. It is, therefore, clear to my mind, after considering the nature of the bar to further proceedings—namely, by bankruptcy—that there is an absolute break in the relation or suggested relation between the creditor and the insurance company. The money which is being received and which will be distributed by the liquidator is a sum which the debtors, the company, have secured should be paid to them in certain events, but which has been secured by their own contract made with the insurance company, and not by any intervention of the creditor, Mr. Chaplin, although it was in consequence of an

C. A. 1927

HARRINGTON MOTOR CO., *In re.* CHAPLIN, *Ex parte.*

Lord Hanworth M.R.

accident which he suffered that the loss arose, in respect of which the insurance company has made the payment.

A number of cases have been referred to, and quite rightly; but I am not going to refer to many of them. I desire, however, to call attention to what was said in *In re Perkins*. (1) That case involved the question of whether, in the case of two successive assignees who were to keep their assignor indemnified, there was a claim and a right to indemnity to the first assignee by the second assignee, and Lindley M.R. said this, that the damages in an action by the trustee against Perkins's executor would not be confined to the dividend payable to the plaintiff in respect of his proof against Plaistowe's estate; in other words, that the amount which in this case the insurance company has had to pay is not to be measured by the amount of the dividend which will ultimately be paid to Mr. Chaplin. There is a separate and independent liability for the whole amount under the contract made between the company and the insurance company.

Then in *Liverpool Mortgage Insurance Co.'s Case* (2) Kennedy L.J. said: "Upon what grounds of equity or legal logic can it be argued that, because the law, on grounds of public policy, compels the creditor, the liability to whom is the event upon which the right of a bankrupt or of an insolvent company to payment of the sum covered by the contract arises, to be content with such share of the assets of the bankrupt or the company in liquidation as a pari passu distribution between creditors will give, those assets are not to include the payment due under the contract? If the discharge of the liability, against which the contract of insurance or re-insurance was the protection, is not (and I think that it is not) a condition precedent to the right to claim payment of the amount of the insurance or the re-insurance, upon what ground ought it to be held that, if the person entitled to that payment becomes bankrupt, or, if a company, goes into liquidation, the trustee of the bankrupt or the liquidator of the insolvent company does not have the

(1) [1898] 2 Ch. 182. (2) [1914] 2 Ch. 617, 639.

right to the payment of that amount in full which the bankrupt before his bankruptcy or the company before its liquidation possessed because, when he has received the amount, the law intercepts the asset in his hands, and compels him to apply it in a particular way as part of the estate divisible amongst all the creditors?" What had been suggested there was that there had been a restriction of the liability of the insurance company to the amount which would be paid by way of dividend in respect of a loss. But in that case, not only in the passage I have quoted but in many other passages, it is plainly the independence of the contract of insurance from the liability which it insured which is pointed out and affirmed.

I go back to the authority referred to in all these cases, which is *Carr* v. *Roberts* (1), in which there was a question as to what was the amount of the indemnity which should be paid over to a person who had not, at that time, paid the whole of the debt—whether or not under the contract of indemnity there was a liability on the part of the surety to the full amount, or only to such sum as had actually been paid over? Littledale J. puts it in this way (2): "The defendant suffers no prejudice in being called upon to pay the whole amount: it is his duty to pay it; and it makes no difference as to that, whether she applies it in discharge of the debt or not," and Patteson J. says (3): "As to the amount of damages, I think the plaintiff is entitled to the whole sum claimed. The argument to the contrary is only this, that if she recovered it, she might not make a proper use of it." That case is treated as an original authority, and has been followed in a number of other cases in which it is pointed out that the liability of the insurance company is as to the full amount on the contract of insurance, and is not measured or varied by what may happen to the money when received or by what has been done by the assured. Similarly and by parity of reasoning, it appears to me that those cases illustrate and enforce the complete independence

(1) (1833) 5 B. & Ad. 78. (2) 5 B. & Ad. 84.
(3) 5 B. & Ad. 85.

C. A. 1927

HARRINGTON MOTOR CO., *In re.* CHAPLIN, *Ex parte.*

Lord Hanworth M.R.

of the contract of insurance as apart from the risk which it insured and the liability of the assured to the person who brings about the fact of loss. In my opinion, therefore, there was not any privity at all as between Mr. Chaplin and the insurance company.

I may perhaps point out that, from the point of view of the Workmen's Compensation Acts, a special section has been passed (see s. 5 of the Act of 1906 now replaced by s. 7 of the Act of 1925) which enables the workman, in the event of the employer who has entered into a contract with insurers becoming bankrupt or making a composition or arrangement with his creditors, to stand in the shoes of the employer, with the result that the rights of his employer are transferred to and vest in him, the workman, subject to certain conditions and limitations of liability. I only refer to that section as showing that this same difficulty has been considered and provided for by the Legislature in certain cases. It may be that the present case is one that ought to be provided for by the Legislature. But as the authorities stand it is impossible, I think, to vary the order of Eve J., which was made upon a true reading of the authorities, and for these reasons it appears to me that this appeal must be dismissed, even though one may regret that it is not possible to earmark this sum and to say that the liquidator ought to be allowed to receive it and to pay it over, inasmuch as it was the misfortune of Mr. Chaplin which caused this sum to be received, a sum which will enure to the benefit of all the creditors of the company and not to the particular advantage of the man who suffered the loss which quantified the risk which the insurance company had taken.

The appeal must be dismissed with costs.

ATKIN L.J. In this case I am of the opinion that the applicant has a real grievance, and if it were possible to decide for him I should very willingly do so. But it appears to me that the general rules of law which govern cases of insurance and indemnity have been laid down in such terms that it is impossible to make an exception in the particular

class of cases of which this forms one, and I am bound to say that I myself should be well satisfied if, by the decision of a higher tribunal or by legislation, the general rule of law were altered so as to cover this particular case. Any member of the public would thoroughly appreciate the position. It is a case where a pedestrian was injured by a company owning taxicabs, by the negligence of a driver of one of its cabs. He recovered a sum which I will call roughly 420*l.* for damages and costs against the defendant company. The defendant company were insured against third party risks, and the insurance company, as usual, conducted the defence. After judgment had been given the insurance company, acting thoroughly bona fide, obtained a stay upon the usual terms with a view to an appeal, which they did not pursue. Within a few days—two days, I think, after judgment—the defendant company presented its petition for winding up, and it is not suggested that that was done in bad faith. There is no evidence before us that even that was caused by the fact that this judgment had been given, and in view of the fact that the defendant company were covered by the insurance to the full amount of the policy, I should think that it is very unlikely that the cause of the presenting of the petition was the judgment against the company. Now the defendant company turns out to be insolvent, and the insurance company have paid over to the defendant company about 420*l.*, which the defendant company had a right to claim under the insurance policy as an indemnity against the judgment obtained against them. The sum was paid, with a deduction for premiums and so forth, but that is irrelevant for this particular matter. The applicant in the liquidation not unnaturally said: "You have received 420*l.*, which you obtained upon a policy which entitled you to receive that money as an indemnity against my claim; therefore pay over to me that 420*l.*," and the liquidator says, "No; that sum of money has now become the general assets of the estate, and though I received that 420*l.* to indemnify the company against your claim, I can receive it to distribute among other creditors of the company pari passu

C. A. 1927

HARRINGTON MOTOR CO., *In re.* CHAPLIN, *Ex parte.*

Atkin L.J.

with yourself." As I say, that seems to me to disclose a hardship.

But the position in law seems to me clearly to be that a third party in a case like the present has no claim in law or in equity of any sort against the insurance company, or against the money paid by the insurance company, nor has he any claim against the person who injures him, the assured, to direct the assured to pay over the sum of money received under the insurance policy to him. The amount that the assured in fact received is part of his general assets. As a general rule the expediency of that, I think, cannot be disputed. It obviously would disturb the whole practice of insurance if the claimant against the assured who caused the risk had a direct right of recourse against the insurance company, and we know that in actual practice the assured receives the money—the parties being solvent—and does not pay over necessarily that sum of money to the third party who is injured, but, of course, pays his claim out of his own assets and uses the insurance money, so far as it goes, because it does not always completely meet his liability. Mr. Stable, in his interesting and able argument, admitted that, apart from insolvency, the third party has no sort of right in equity against the insurance company under the policy. If that is so, that really seems to me to dispose of the case, because I find it impossible to see how a special right, arising out of circumstances which ordinarily occur in cases of solvency, could come into existence merely because the assured happened to be in difficulties or financial weakness, or to become bankrupt or, if a company, to have a winding-up order made against it.

But in fact there appears to me to be authority on the matter which I should treat as binding, and that is the decision in *Liverpool Mortgage Insurance Co.'s Case.* (1) I agree that the actual point determined in that case was not the point which we are now considering. In *Liverpool Mortgage Insurance Co.'s Case* (1) what happened was this. The Law Guarantee Society had guaranteed the debentures of a company,

(1) [1914] 2 Ch. 617.

to which one need not refer, and the debenture holders had had to realize those securities, and they had to make a claim against the Law Guarantee Society, and the Law Guarantee Society had become insolvent. The Law Guarantee Society had a proof made by the debenture holders in the company for some 4900*l.*—say, some 5000*l.* They had reinsured two-elevenths of that risk with the Mortgage Insurance Company, who were parties to this particular proceeding, and the question raised by the reinsurers, the Mortgage Insurance Company, was whether they had to pay over two-elevenths of the full amount of 5000*l.*, for which the Law Guarantee Society were liable, or whether they only had to pay two-elevenths of the sum which the Law Guarantee Society should eventually pay by way of dividend, that is to say, whether they had to pay the full liability, or whether they only had to pay the actual sum paid by the Law Guarantee Society in the course of their insolvency, diminished because they were insolvent, and the Court came to the conclusion that their obligation was to pay the full amount of the liability and not merely the amount which the Law Guarantee Society should in fact pay by way of dividend. But all the learned Lords Justices, in dealing with the matter, delivered themselves of opinions as to the rights of the debenture holders and the rights of the Law Guarantee Society as against the debenture holders, circumstances which no doubt were relevant for consideration, because, as the debenture holders had a right of some kind in equity to the proceeds of the reinsurance money, there is no doubt that that would have a substantial bearing on the question whether the reinsurers would have to pay the full amount. I said that every one of the Lords Justices dealt with this matter. Buckley L.J. says (1): "The equitable doctrine is that the party to be indemnified can call upon the party bound to indemnify him specifically to perform his obligation, and to pay him the full amount which the creditor is entitled to receive, and that whether having received it he applies it in payment of that creditor or not is a matter with which the party giving the

(1) [1914] 2 Ch. 617, 633.

C. A. 1927

HARRINGTON MOTOR CO., *In re.* CHAPLIN, *Ex parte.*

Atkin L.J.

indemnity is not concerned. In such a case the party indemnified is entitled to receive 20*s.* in the pound, and, having got it, to deal with it as he thinks proper." Then a little later on, referring to *Carr* v. *Roberts* (1), he says: "The case is that which is put in *Carr* v. *Roberts* (1), where both Littledale J. and Patteson J. at the conclusion of their judgments point out that it is the duty of the defendant to pay the whole amount, and it makes no difference whether it is applied in discharge of the debt, or whether the plaintiff, having recovered it, does not make a proper use of it." Kennedy L.J. goes still fuller into the matter, and says (2): "How the person who receives payment of a sum of money under a contract of insurance or re-insurance, or, I will add, of indemnity, deals with that sum is, in general and apart from special considerations, no concern of the party who, in fulfilment of his contract, has made the payment to him. Upon what grounds of equity or legal logic can it be argued that, because the law, on grounds of public policy, compels the creditor, the liability to whom is the event upon which the right of a bankrupt or of an insolvent company to payment of the sum covered by the contract arises, to be content with such share of the assets of the bankrupt or the company in liquidation as a pari passu distribution between creditors will give, those assets are not to include the payment due under the contract?" That seems to me to be a direct statement by the learned Lord Justice; indeed, a statement of the law, that the third party is compelled by the law to be content with such a share of the assets as a pari passu distribution between the creditors will give. He goes on to say: "If the discharge of the liability, against which the contract of insurance or re-insurance was the protection, is not (and I think that it is not) a condition precedent to the right to claim payment of the amount of the insurance or the re-insurance, upon what ground ought it to be held that, if the person entitled to that payment becomes bankrupt, or, if a company, goes into liquidation, the trustee of the bankrupt or the liquidator of the insolvent company does

(1) 5 B. & Ad. 78. (2) [1914] 2 Ch. 617, 639.

not have the right to the payment of that amount in full which the bankrupt before his bankruptcy or the company before its liquidation possessed because, when he has received the amount, the law intercepts the asset in his hands, and compels him to apply it in a particular way as part of the estate divisible amongst all the creditors?" Scrutton J. says (1): "If it be said that the society's argument enables the general creditors to make a profit, the answer appears to be that it is not the society's argument, but the operation of law which, though a creditor has a claim which the debtor has re-insured, takes the contribution of the re-insurer and divides it between the general body of creditors, because the creditor has no privity with the re-insurer, and no charge, lien, or equitable security, on his payment to the debtor," and he repeats the same thing in other words elsewhere. Those propositions appear to me precisely to cover this case, and in the face of them I think it would be impossible for this Court to lay down a different rule, even if it differed from them. I am far from saying that I do differ from them, because it seems to me to follow that the admission which was made by Mr. Stable, and quite properly made, that where all parties are solvent there is no right, compels the conclusion that there is no right in the case where the assured is insolvent, and that appears to me to cover the main part of this case. Of course it is material, in dealing with a case of this kind, to consider the actual terms of the contract, and in the present case the terms are that the company will indemnify the assured against "All sums which the assured shall be legally liable to pay by way of compensation for: (*a*) accidental bodily injury caused by any of the assured's motor vehicles described in the schedule hereto to any person not being the driver of such vehicle," and "the company will, in addition where any claim is contested by or with the written consent of the company, pay all costs recovered by any claimant against the assured," and it is with reference to a contract in those terms that I have made the remarks I have. They seem to me not to differ in any way from any ordinary policy of insurance.

(1) [1914] 2 Ch. 617, 646, 647.

C. A. 1927 HARRINGTON MOTOR CO., *In re.* CHAPLIN, *Ex parte.* Atkin L.J.

Then Mr. Stable said a different position is brought into existence, so far as the costs were concerned, by reason of the circumstance that the sum which is here claimed for costs, some 200*l.* odd, in fact created the whole asset which the liquidator has received. But that seems to me, with great respect, to be a fallacy. That which created the asset was the principal existing contract of insurance. The costs are only the loss or the risk or the event upon which the policy moneys become payable, and they no more create the asset than the unfortunate fact that Mr. Chaplin was in the roadway when the taxicab ran into him, created the other part of the asset which constituted the claim for personal injuries, and it appears to me that no special equity can arise with regard to those costs.

Then it is said that this is a case in which the Court, in the exercise of its discretion under s. 142 of the Companies (Consolidation) Act, 1908, may allow execution to issue against the company. It appears to me that it would be wrong to allow execution to issue in the present case. Execution is not, as a rule, allowed to issue unless there has been some wrongdoing, some trick, or fraud, or something short of fraud, some misfeasance on the part of the company which makes it right that execution should issue in a case where it would have probably issued but for that fraud or wrongdoing. But those circumstances do not exist here; they are specially disclaimed. There is no suggestion of that kind against anybody here. The position is that the general law, however unfairly it may work in this class of case, has a general operation, and the general rule must prevail that the assets are to be divided pari passu amongst all the creditors, and therefore I see no reason for giving special leave to issue execution.

It appears to me that exactly the same remarks apply to the point raised with reference to the application of *Ex parte James.* (1) Here for the reasons I have given in dealing with the request for leave to issue execution, there are no special circumstances which would entitle us to say that

(1) L. R. 9 Ch. 609.

there is something dishonourable, unbecoming an officer of the Court, in keeping these assets and distributing them amongst the creditors. Therefore it appears to me that this case must fail.

Mr. Stable relied, and naturally relied, very strongly on *In re Richardson* (1), and I am bound to say, after the discussion of that case in *Liverpool Mortgage Insurance Co.'s Case* (2) and in other cases, that it only amounts to an authority in cases which fall within its very special facts. There is no doubt that in that case, in some very complicated proceedings, special leave had been given to the landlord and the trustee in bankruptcy of the tenant to bring an action against the bankrupt tenant and his wife, who was the cestui que trust for whom the bankrupt held the tenancy, to recover an indemnity in respect of the tenant's liability on the repairing covenants, and an order had been made that any sum which was recovered was to be at the disposition of the Court of Bankruptcy, which was to decide as to whether the bankrupt's estate or the landlord was to receive it. How that action came to be framed, or what would have happened if it had in fact been fought, I do not think that any one at this time can tell. But I think that at that time, before the action was tried, the wife paid a sum of money into Court, and the only question for the Court to determine was whether the landlord or the trustee in bankruptcy should receive it, and it was held on the facts of that case, that inasmuch as the trustee in bankruptcy claimed by virtue of his right to an indemnity as the legal trustee of the wife and as he would be making a profit out of his trust, regarding him merely in his position of trustee for the cestui que trust, the proper thing to do was to hand it over to the landlord. The special facts of the case are very unlikely to occur again, and I think the decision must be read with special reference to those facts. Therefore in my opinion this appeal should be dismissed.

I agree, that on the whole this is an unsatisfactory result of the application of legal principles which are very

(1) [1911] 2 K. B. 705. (2) [1914] 2 Ch. 617.

C. A. 1927

HARRINGTON MOTOR CO., *In re.* CHAPLIN, *Ex parte.*

Atkin L.J.

good in themselves, but which I should like to be able to modify to meet the special facts of this class of case, which is, of course, a very common one. I notice, for instance, in this case, that the Commissioner of Police requires as a condition of the licence to a cab owner that he should have taken out a policy against third party risks in quite a large sum. It is quite obvious that that very reasonable and proper precaution is defeated in the very case in which it is intended to be of most use—namely, where the cab owner becomes insolvent—and indeed, as pointed out in argument, it would appear as though a person who is insured against risks and who has general creditors whom he is unable to satisfy, has only to go out in the street and to find the most expensive motor car or the most wealthy man he can to run down, and he will at once be provided with assets which will enable him to pay his general creditors quite a substantial dividend! That, however, is a result which is, perhaps, not very likely to happen, but which, in the present state of the law, cannot be avoided.

In my opinion the learned judge below here applied quite the right principles, and therefore this appeal must be dismissed with costs.

LAWRENCE L.J. I agree entirely with the judgments delivered by the other members of the Court, and will only add a very few remarks of my own. Of course, however much we may sympathize with the appellant in this case, we cannot allow that sympathy to lead us astray, or do otherwise than administer the law as it exists.

In my opinion the learned judge was plainly right. The case, when stripped of all its fringes, amounts simply to this, that the appellant claims the benefit of a contract of insurance made between his debtor and an insurance company, to which contract he was neither party nor privy. It is not suggested that the benefit of the contract was assigned to the appellant or that the assured constituted himself a trustee of the benefit of the contract for the appellant. In the absence of any such assignment or trust I fail to see how

the appellant can establish any claim to the money paid under the contract. It is suggested that the insolvency of the debtor operates in some way to give to the appellant a charge or lien on the money so paid, but in my judgment it is clear that such insolvency has no such operation and confers no right to that money which had not been acquired by the appellant before the insolvency. It is well settled that money paid under a policy such as this to a solvent assured is not, in his hands, charged in favour of or appropriated to the person in respect of whose claim it has been paid.

Mr. Stable, in his able argument, based his case almost exclusively upon the decision in *In re Richardson.* (1) I confess to being very much puzzled by that case, and not for the first time on the hearing of this appeal. Even with Mr. Stable's assistance I have failed to understand the principle upon which it was decided. If that case had laid down any principle applicable to the facts of this case, we should be bound to follow it, but so far as I understand that case it did not nor did it purport to call in question the general principle that no person is entitled to claim the benefit of or to enforce a contract to which he is not a party or privy. Whatever may have been the ratio decidendi of that case, I do not think that it applies here; the facts there differed widely from the facts here.

There remains the question whether the learned judge has rightly exercised his discretion in not allowing execution on the judgment to proceed. The general principle on which that discretion is exercised is that, if a company has done something in the way of vexatiously delaying the issue or enforcement of the execution or has misrepresented the facts, or has otherwise done something wrongful as against the judgment creditor, then the Court will not allow the other creditors of the company to take advantage of that wrongful act and thereby make themselves party to it. To exercise the discretion in this case would mean that, because the appellant has a meritorious claim, with which the Court

(1) [1911] 2 K. B. 705.

C. A. 1927

HARRINGTON MOTOR CO., *In re.* CHAPLIN, *Ex parte.*

Lawrence L.J.

sympathizes, he should therefore be allowed to proceed to enforce his judgment against the assets and thus disturb what the law has laid down to be the underlying principle of the Bankruptcy and Winding-up Acts—namely, an equal distribution of the assets among the creditors. In the circumstances I think that the learned judge has rightly exercised his discretion.

I need say but little about the appeal to this Court to apply the principle of *Ex parte James* (1), and to allow execution to proceed for the costs which the appellants had incurred in establishing his claim against the company. *In re Thellusson* (2), which was relied on in support of that appeal, seems to me to have no application to the facts of the present case. Mr. Stable contended that the costs which the appellant had so incurred had produced the fund, and therefore that such costs stood in the same position as the premiums in *In re Thellusson.* (2) In my opinion, for the reasons stated by my Lords, that contention cannot be upheld. I need not elaborate the matter, but I concur in the view that the costs incurred in enforcing the claim against the company have not, in any proper sense, produced the fund within the principle of *In re Thellusson.* (2) What has produced the fund here is the payment by the debtor of the premiums under the policy, and if the appellant had paid those premiums or if the insurance company had disputed its liability and the appellant had been requested or permitted to bring an action in the name of the assured against the insurance company and had succeeded in producing the fund in that way, I think that the case would have been different and that the Court would probably have allowed him such premium or the costs of such litigation.

In the result the appeal fails and must be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *W. Hilliard & Ward.*

Solicitors for respondent: *Simmons & Simmons.*

(1) L. R. 9 Ch. 609. (2) [1919] 2 K. B. 735.

W. I. C.

MANCHESTER CORPORATION *v.* AUDENSHAW URBAN DISTRICT COUNCIL AND DENTON URBAN DISTRICT COUNCIL.

EVE J.
1927
July 19, 20 ; *Oct.* 17, 18, 19, 20, 21 ; *Nov.* 16.

[1926. M. 6105.]

Highway—Maintenance—Increase of Traffic—Deterioration of Road made under Specification of local Act—Measure of Liability—Standard of Repair—Manchester Corporation Waterworks and Improvement Act, 1875 (38 & 39 *Vict. c. clxi.*), *s.* 14, *sub-s. ii.*

Under the provisions of a local Act of 1875 the Manchester Corporation were authorized to make a new road, lying partly within the districts of the two defendant councils, such road to be "at all times thereafter maintained" at the expense of the corporation, and to be of the dimensions, character, and composition therein expressly specified. The work was done according to all the requirements and provisions of the Act and the road completed in April, 1878, as a waterbound macadamized road. At that date and for many years afterwards the road amply sufficed for the slight traffic thereon, and was maintained at the expense of the corporation. From 1914 onwards the traffic increased enormously in weight and volume, so that the road began to deteriorate and was now in a state of serious disrepair.

In an action by the corporation against the two defendant councils to have the measure of the plaintiffs' obligation under the Act to maintain the road determined :—

Held, applying *In re Sharpness New Docks* and *Gloucester and Birmingham Navigation Co.* v. *Attorney-General* [1915] A. C. 654, that the plaintiffs were only liable to maintain the road in the state in which it was in at the date of its completion in 1878.

The defendant councils were the highway authorities within their respective districts and the successors of the Audenshaw and Denton Local Boards. The Manchester Corporation were the waterworks undertakers for the city of Manchester and surrounding areas. For the purpose of constructing reservoirs in the districts of the two defendant councils the Manchester Corporation obtained certain powers under the Manchester Corporation Waterworks and Improvement Act, 1875. The construction of these reservoirs necessitated the covering of part of the site of a road known as Taylor Lane, which was partly in the districts of these two councils, and the corporation were authorized by the Act to construct a new road to be substituted for part of

EVE J. 1927 MANCHESTER CORPORATION v. AUDENSHAW URBAN COUNCIL AND DENTON URBAN COUNCIL.

Taylor Lane. By s. 14, sub-s. ii., of the Act it was provided that the new road so authorized should be at all times thereafter maintained by and at the expense of the corporation, and should be made of the width of 14 yards, inclusive of a stone boundary wall to be erected by the corporation on each side fencing such road off from the adjoining lands, and should have a footway of not less than $7\frac{1}{2}$ feet wide on each side, to be made with a rubble or cinder foundation and gravel cover of not less than 12 inches in depth altogether, and with curbstones; the carriage-way of the said road should be macadamized, the foundation thereof to be rubble 6 inches in depth covered with hard macadam to the depth of at least 12 inches. Provision was made by sub-s. iii. for the making and maintaining of a main sewer under the new road. By sub-s. iv. of the same section it was provided that the new road should not be deemed to be completed until it should have been made and sewered in accordance with the foregoing provisions of the Act, and to the reasonable satisfaction of the Audenshaw and Denton Local Boards respectively. The said new road was made and completed about April, 1878, to the satisfaction of the two Local Boards, and was known as Corporation Road. At first and for many years afterwards the traffic on this road was of a very limited amount, being confined to foot passengers and horse-drawn vehicles. During this period the road was repaired by the corporation at a small annual cost, and was amply fit for the traffic. During recent years the traffic had enormously increased and was of an entirely different character to the traffic when the road was made. The effect of the increased traffic, especially of a number of heavy and fast motor vehicles, had caused great damage and injury to the road, the construction of which was entirely unsuitable for the present day traffic. The plaintiffs alleged that the defendant councils contended that the plaintiffs were liable under the Act of 1875 from time to time to construct and reconstruct, and maintain and keep in repair the said road in manner suitable for the requirements of the traffic for the time being using the said road. The plaintiffs, while ready and willing to discharge their

obligations under the Act, maintained that they were only liable under s. 14, sub-s. ii., of the Act to maintain the road in the condition it was in when it was made and completed in April, 1878. The plaintiffs issued their writ on November 30, 1926, and by clause 1 of the prayer of their claim asked for a declaration to that effect. The defendants by their statement of defence referred to other sections of the Act, including s. 11, under which the corporation were authorized to make, construct, lay down and maintain the several works therein described including No. 22, a road commencing in Taylor Lane in the position and of the length therein specified, being the new road referred to in the statement of claim. They also referred to ss. 13 and 14, sub-s. ix., and submitted that the carriage-way of the road had not been and was not now being properly "maintained" by the plaintiffs and was in a bad state of repair. They contended that the plaintiffs were under an obligation to maintain the carriage-way of the road in a fit state to bear the ordinary traffic thereon at the present day, and they counterclaimed to have a declaration in those terms. Further, in the alternative they asked for a declaration that the plaintiffs were under an obligation at all times to maintain a macadamized carriage-way, the foundations thereof to be rubble 6 inches in depth, covered with hard macadam with a depth of at least 12 inches; and that such an obligation existed whatever might be the nature of the ordinary traffic thereon at the present day. Many witnesses were examined on both sides and the general conclusions to be drawn from the evidence are sufficiently summarized in the judgment of the Court.

Sir Herbert Cunliffe K.C. and *John Bennett* for the plaintiffs. The case turns upon the construction to be placed upon s. 14, sub-s. ii., of the Manchester Corporation Waterworks and Improvement Act, 1875, as to the obligation of the plaintiffs to construct and at all times thereafter "maintain" this Corporation Road. A similar question was raised with regard to the standard of repair to a highway carried by a bridge over a canal in *Sharpness New Docks and Gloucester*

EVE J.
1927
MANCHESTER CORPORATION v. AUDENSHAW URBAN COUNCIL AND DENTON URBAN COUNCIL.

and Birmingham Navigation Co. v. *Attorney-General.* (1) In that case a canal company had power under a Canal Act passed in 1791 to make bridges over a canal and to maintain and keep such bridges in sufficient repair. In an action by the Attorney-General at the relation of an urban authority against the canal company for a declaration that they were liable to keep the bridges in repair so as to bear the traffic which might reasonably be expected to pass along the highways carried over the canal by the bridges, having regard to the present character and needs of the district, it was held by the House of Lords that the company were only liable to keep the bridges in repair in the condition in which they were made in accordance with the requirements of the Commissioners appointed under the Worcester and Birmingham Canal Act, 1791. The principle of the measure of liability laid down in that case was applied to a case of a highway bridge over a railway where there had been a great increase of traffic in *Attorney-General* v. *Great Northern Ry. Co.* (2) The House of Lords there held that the railway company was liable to maintain the bridge in the condition as to strength in relation to traffic in which it was at the date of completion, and were not liable to improve and strengthen the bridge to make it sufficient to carry the ordinary traffic of the district which might reasonably be expected to pass over it according to the standard of the present day. There was a dissenting speech, however, in that case by Viscount Haldane. We submit that there is no difference in principle between the maintaining of a highway, as in the present case, and the maintaining of a bridge carrying a highway over a canal or a railway. If the defendants are right in their contention complete reconstruction of this road would be necessary to support the existing present traffic, which is more likely to increase than to remain stationary. This last case was followed in *Attorney-General for Ireland* v. *Lagan Navigation Co.* (3), which was the case of a bridge carrying a highway over a canal, and there had been a change in the character

(1) [1915] A. C. 654. (2) [1916] 2 A. C. 356.
(3) [1924] A. C. 877.

and volume of the ordinary traffic. The Court held that the obligation of the canal company under the terms of the special Act in that case " to maintain and keep all bridges in good and substantial repair " was to maintain the bridge in question in a state of repair sufficient for the ordinary traffic at the date of the passing of the Act. That case shows that a covenant or a liability to repair does not mean to reconstruct. Another case on the question of the liability for reconstruction of a private road is *Scott* v. *Brown* (1), where there was a covenant to contribute to the expenses of repairing and maintaining a road, and the covenantor was held not liable for the expenses of reconstruction. So also in *Leek Improvement Commissioners* v. *Stafford Justices.* (2) In that case there was a liability for the " maintenance " of a macadamized road, and it was held that maintenance was equivalent to repair, and must be done by the county authority. There is therefore in the present case, on the authorities, no obligation cast upon the plaintiff corporation except to repair and maintain a road of the character to support the kind of traffic existing at the time of the passing of the Act of 1875. It is impossible to say that it contemplated a future reconstruction of the road. We ask, therefore, for a declaration in the terms of para. 1 of the claim.

Joshua Scholefield K.C. and *H. A. Hill* for the defendant councils. The canal and railway bridge cases are distinguishable from the present. Here the plaintiffs have not in fact maintained this road, even according to the standard at the date of the completion in 1878 ; and as a waterbound macadamized road it is capable of being sufficiently repaired with the help of modern methods, such as "spraying," and would on the evidence last for another five years, after which further repairs would be necessary. There is no question of reconstruction, the foundations are neither crushed nor destroyed according to the evidence for the defendants. The obligation on the plaintiffs to " maintain " is in absolute terms, and it has not been carried out. With regard to the

(1) (1904) 69 J. P. 89. (2) (1888) 20 Q. B. D. 794.

EVE J.
1927
MANCHESTER CORPORATION v. AUDENSHAW URBAN COUNCIL AND DENTON URBAN COUNCIL.

Sharpness case (1) it was a decision on the construction of a particular Act, and it was held that there was no obligation thereunder to construct a new and stronger bridge, which would have cost a very large sum. The other cases relied on by the plaintiffs are also capable of being distinguished. It is simply a question of what amounts to a repairing or maintaining of this roadway, as in *Moore* v. *Todd* (2), where there was no question of reconstruction. The Court, we submit, ought not to follow the principle applied in the bridge cases, and here the Court is asked to go a step further than in those cases. We do not ask for reconstruction, but merely to "maintain" this road.

Sir Herbert Cunliffe K.C. in reply. The corporation have never sought to evade any burden placed upon them by the legislature, but are now being asked by the defendants to shoulder a burden which was never in the contemplation of anybody. It is agreed on both sides that this species of road is obsolete so far as modern motor traffic is concerned. The main issue is whether or no the corporation is bound only to keep up this road in a condition to carry the traffic such as existed in 1878. We submit that is the standard of liability, and the authority for that is ample. Our evidence points to a disintegration of the core of the road, and no scheme to repair it as a waterbound road that would last has been put forward by the defendant councils. If the principle in the *Sharpness* case (1) applies, as we contend it does, then the plaintiffs are entitled to judgment and the counterclaim fails.

Cur. adv. vult.

Nov. 16. EVE J. delivered the following written judgment: This action has been brought to determine the liability of the plaintiff corporation in respect of the maintenance of a road known as Corporation Road situate partly in each of the districts of the defendant councils.

The road was constructed by the plaintiffs in 1878 under powers conferred by The Manchester Corporation Waterworks and Improvement Act, 1875, whereby the plaintiffs

(1) [1915] A. C. 654. (2) (1903) 68 J. P. 43.

were authorized to make, construct, lay down and maintain the reservoirs and roads (including the road in question) therein enumerated and when and so soon as the same were completed and opened to the public to stop up and appropriate to the purposes of the new reservoirs (inter alia) a portion of Taylor Lane therein defined; and by s. 14, sub-s. ii., of the Act it was enacted that the road in question in this action should be at all times thereafter maintained by and at the expense of the plaintiffs and should be of the width of 14 yards inclusive of a stone boundary wall to be erected by the plaintiffs on each side fencing such road off from the adjoining lands and should have a footway of not less than $7\frac{1}{2}$ feet wide on each side to be made with a rubble or cinder foundation and gravel cover of not less than 12 inches in depth altogether and with curbstones and that the carriage-way of the road should be macadamized, the foundation thereof to be rubble 6 inches in depth covered with hard macadam to the depth of at least 12 inches. And it was thereby further provided that the road should not be deemed to be completed until it should have been made and sewered in accordance with the provisions therein contained and to the reasonable satisfaction of the defendants' predecessors, the Audenshaw and Denton Local Boards respectively.

In April, 1878, the road was completed in accordance with the statutory requirements and to the satisfaction of the two Local Boards. It served a district which, at the time of its construction and for many years thereafter, was mainly of an agricultural character. In the early years of the present century, a foundry and some dwelling-houses were erected on land abutting on the road. Down to that time it had remained fenced off from the adjoining lands by the walls mentioned in the Act. Some other works fronting on the road have since been erected and the neighbourhood has now become of a distinctly industrial character. In the absence of any complaints on the part of the defendants, who are the highway authorities of their respective districts, it may, I think, be assumed that down to a date shortly after the conclusion of the war, the plaintiffs had duly discharged

EVE J.
1927
MANCHESTER CORPORATION v. AUDENSHAW URBAN COUNCIL AND DENTON URBAN COUNCIL.

their statutory obligations to maintain the road. But from a date somewhere about the commencement of the war it had become apparent that the road, an ordinary waterbound macadamized structure, would not be adequate to carry the increasing traffic of the district or to sustain the disintegrating shocks inseparable from the passage along it of the heavy and fast motor traffic which was rapidly supplanting the slow moving traffic of the seventies. The rapid deterioration of the road and the increasing costs thereby imposed on the plaintiffs brought matters to a head, and for some considerable period prior to the commencement of this action discussions were carried on between the plaintiffs and the defendants both verbal and written as to the proper party to be charged with the expense necessary for restoring the road to a condition suitable for accommodating present day traffic. A divergence of opinion on the construction of the statute and the failure to arrive at any compromise acceptable to both sides resulted in the institution of this action.

The conclusions to be drawn from the evidence adduced at the trial can, I think, be summarized thus: (1.) By a macadamized road in 1875, and for a quarter of a century afterwards, was meant a road of waterbound macadam. Tar spraying and the use of tar macadam did not exist prior to the commencement of the present century. (2.) Such a road was adequate for the traffic over this road in 1878 and the next forty years. (3.) During such last mentioned period, the road was maintained by the plaintiffs in accordance with their statutory obligations. (4.) The road at the commencement of this action was, and it still remains, in a condition of serious disrepair. This condition is in the main due to traffic of a character unknown in 1878 and for many years afterwards. (5.) The road is not incapable of being repaired as a waterbound macadamized road, but unless such repair is supplemented by the introduction of some binding material and by tar spraying or some other expedient unknown before 1900, the already existing traffic over it will inevitably bring about rapid destruction. (6.) The

result is that from the economic standpoint the road constructed in accordance with the statutory requirements of 1875 cannot be maintained in a condition adequate for present day traffic without expenditure of a nature unknown and on work never contemplated until the road had been completed and in use for a quarter of a century and more. (7.) The traffic over the road when repaired is more likely to increase than to remain stationary.

It is in these circumstances that the plaintiffs seek to have the measure of their obligation judicially determined Is it limited to the expense attendant on the maintenance of the road as completed in 1878, or does it extend to the already substantially increased and to the unknown future cost of providing for all modern means of locomotion? Questions of a similar nature have arisen not infrequently of late, and the answer in each case depends on the construction of the Act by which the obligation is imposed.

In the present case, the primary obligation was to construct to the reasonable satisfaction of the defendants' predecessors a particular length of road in accordance with the specification contained in the Act and to open it to the public as a substituted highway for so much of the old thoroughfare known as Taylor Lane as the undertakers were thereby authorized to stop up and appropriate to the purposes of the new reservoir. This primary obligation was duly carried out, and on the evidence it is quite clear that the substituted road was more convenient and a more substantial thoroughfare than the closed one. The obligation to maintain is coupled in sub-s. ii. of s. 14 of the Act with the provisions specifying the actual mode of construction, and I come to the conclusion that the true intent and effect of the language is to impose on the undertakers the burden of maintaining the road so constructed and not to create a liability so to supplement, alter or replace the construction thereby specified as to make it available for the passage of traffic wholly dissimilar from that for which the specification was framed. The case, in my opinion, is covered by the decisions in the

EVE J.
1927
MANCHESTER CORPORATION v. AUDENSHAW URBAN COUNCIL AND DENTON URBAN COUNCIL.

Sharpness case (1) and other cases cited in argument on behalf of the plaintiffs. Applying what Lord Parker says in his speech in the *Sharpness* case (1) to the facts of this case, I should say that what the plaintiffs have to maintain is the fabric of the particular road of which the size, character and formation were determined by the Act and that there is no principle of construction by which an obligation to maintain a particular structure can be enlarged into an obligation to reconstruct the fabric in such a way that it is materially different in size, character or formation from the particular fabric the subject of the obligation, and he adds: "The standard by which the obligation is to be judged is neither the ordinary traffic when the canal was constructed nor the ordinary traffic of to-day, but the bridge itself as determined by the Commissioners under the Act." From this, it would appear that if the plaintiffs are entitled to a declaration it ought to be one in the terms of para. 1 of their original claim—a declaration that they are only liable to maintain the road in the condition in which it was completed in April, 1878, and on this the defendants raise the argument that, inasmuch as the road is not so deformed as to be incapable of repair without actual reconstructive work, the plaintiffs ought to be held liable to effect such repairs as will restore the road to its original condition, and that it is no answer to such a claim to assert and prove that when so repaired the road will again be destroyed within a space of time altogether out of proportion to the expenditure incurred. There are, I think, two answers to this contention, the first, that no Court would compel an expenditure proved—if not indeed admitted—to be of a most extravagant and wasteful nature, and the second that on the evidence, although, as I have already stated, the road has not yet been so radically damaged as to be incapable of repair without fundamental reconstruction, I am satisfied that some reconstruction work to surface and foundations alike would be called for. But on the other hand the fact that the road has been, and is still being, so used and that present day conditions are such as

(1) [1915] A. C. 654, 669.

to render an obligation to maintain it as in 1878 of no practical use, does not, in my opinion, operate to free the plaintiffs from all liability to contribute to the cost of repair, and if in fact it can be established that any default on the part of the plaintiffs in the years during which they have suspended work on the road has increased the expenditure which will now have to be incurred in restoring the road the plaintiffs are, in my opinion, liable to contribute to the extent of such increase. I propose to make a declaration in the terms of para. 1 of the prayer and to dismiss the counterclaim. I will give leave to the defendants to apply for an inquiry as to any contribution which they may allege ought to be made by the plaintiffs to the cost of reconditioning the road and generally. The defendants must pay the costs of the action and counterclaim.

Solicitors: *Sharpe, Pritchard & Co., for P. M. Heath, Manchester; Stibbard, Gibson & Co., for Rupert Wood, Ashton-under-Lyne; and William Richards, Denton.*

G. M.

[TOMLIN J.
1927
Nov. 21.

In re BRADFORD CITY PREMISES.

[1927. B. 3385.]

Law of Property—Open Space—Yard in Rear of Houses—Ownership in undivided Shares—"Open space of land"—Leave of Court to Sale by Public Trustee—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *Sch. I., Part V., para.* 2.

The Law of Property Act, 1925, First Schedule, Part V., para. 2, provides: "Where, immediately before the commencement of this Act, an open space of land (with or without any building used in common for the purposes of any adjoining land) is held in undivided shares, in right whereof each owner has rights of access and user over the open space, the ownership thereof shall vest in the Public Trustee on the statutory trusts which shall be executed only with the leave of the Court. . . . ." :—

Held, that in this paragraph the expression "an open space of land" means any land that is unbuilt upon.

A small yard and ashes place at the rear of two houses in White Abbey Road, Bradford, was immediately before the commencement of the Act held in undivided shares by the owners of the houses with rights of access and user over the same :—

Held, that the yard and ashes place were an open space within the meaning of the paragraph and had vested in the Public Trustee. Leave given to the Public Trustee to sell the same.

SUMMONS.

By an Order made on October 7, 1924, by the Minister of Health in pursuance of the Housing of the Working Classes Act, 1890, Part I., the Bradford Corporation was authorized to undertake the execution of a scheme for the improvement of an area in the City of Bradford known as the White Abbey area, and for that purpose to take either by agreement or compulsorily any of the lands constituting the area. In pursuance of the scheme the Corporation proceeded to give notice to treat to the owners of certain houses and shops in White Abbey Road, and amongst others to the applicants other than the Corporation in respect of three shops and houses known as 72, 74 and 76 White Abbey Road.

The applicant, Robert Scaife, was immediately before January 1, 1926, the owner of No. 72 White Abbey Road, excepting a small yard in the rear thereof, of which an undivided moiety was vested in him under the following description contained in a conveyance to him dated March 12,

1925 : " One equal undivided moiety or half part of the yard at the rear of the said dwelling-house and shop and the adjoining dwelling-house and shop on the north-west side thereof, and of the ashes place situate near to the said yard and used in connection with the house and shop hereinbefore described and adjoining premises then or then lately belonging to John Roome and the whole of the most south-easterly of the two privies adjoining thereto and opening into the said yard." The applicants, Alfred James Booth, Arthur Richard Roome and Charles Roome were the personal representatives of John Roome, and had vested in them immediately before January 1, 1926, Nos. 74 and 76 White Abbey Road and the other moiety of the yard and ashes place with like rights of user and the whole of the other privy.

By two conveyances dated April 29, 1927, and May 13, 1927, these properties were, with the exception of the yard and ashes place, conveyed to the Corporation.

This summons, to which the Public Trustee was a respondent, was taken out by the applicants under the Law of Property Act, 1925, Sch. I., Part V., para. 3, and raised the question whether the yard and ashes place constituted an open space which had vested in the Public Trustee upon the statutory trusts by virtue of Sch. I., Part V., or whether they had vested in the Public Trustee upon the statutory trusts under Sch. I., Part IV., para. 1 (4.); and the applicants asked that in the former case the Public Trustee might be authorized in exercise of the statutory trusts affecting the open space to sell the same to the Corporation.

The price of the yard and ashes place had been agreed among the applicants at 30*l.*

C. Harman for the applicants. The question is whether a small backyard is an " open space " within the Law of Property Act, 1925, Sch. I., Part V., para. 2. The point is of great importance to the Corporation. In case it is, every purchase of a backyard held in undivided shares will involve an application to the Court before the Corporation can purchase it. In the present case the yard is vested in the Public

TOMLIN J. 1927 BRADFORD CITY PREMISES, *In re.*

Trustee, whether Part IV. or Part V. applies, and the only question involved is whether the leave of the Court is needed before any exercise of the statutory powers. If it be held that such a yard as this is an open space, it would mean that para. 2 of Part V. would be applicable wherever the smallest portion of land unbuilt open was held in undivided shares. It is so ridiculous that some limit must be put on the meaning of " open space " in the Act. The expression is not defined in the Law of Property Act, 1925, but it is suggested that it is used in the sense in which it is defined in the Open Spaces Act, 1906. In s. 20 of that Act the expression " open space " is defined as meaning " any land, whether enclosed or not, on which there are no buildings or of which not more than one-twentieth part is covered with buildings, and the whole or the remainder of which is laid out as a garden or is used for purposes of recreation, or lies waste and unoccupied."

[TOMLIN J. That is a very special definition. Might not " open space of land " in the present case mean land that is unenclosed ?]

That also is a possible view, and would do something to restrict the generality of the expression. Other Acts in which " open space " has recently been defined are the Town Planning Act, 1925, Sch. III., Part II., para. 3 (4.), where it is defined as " any land laid out as a public garden or used for the purposes of public recreation, and any disused burial ground," and the Housing Act, 1925, s. 103, where it is given the same definition.

[TOMLIN J. I do not think I can apply any of these special meanings; in the absence of a definition I must give the words " open space of land " their natural meaning.]

In Wolstenholme and Cherry's Conveyancing Statutes, 11th ed., p. 512, it is suggested that the paragraph will apply to open spaces like the London squares.

[TOMLIN J. I never heard of a London square being held by the owners of the surrounding houses in undivided shares. I should have thought that was just one of the cases where it would not apply.]

That seems so. A London square generally belongs to a common landlord, who gives his tenants rights of user over it. The paragraph may well mean by an open space of land unenclosed land.

H. H. King, as amicus curiae, said that the history of the paragraph was that the closing of the bracket had accidentally got shifted from after "building" to its present position.

J. W. F. Beaumont for the Public Trustee. The natural meaning of an open space of land is land which is unbuilt upon. It is difficult to see how it can mean unenclosed land. Hyde Park is surely an open space, and yet it is railed in. What is being dealt with by the paragraph is unbuilt on land, and it vests in the Public Trustee subject to the existing rights of user. "Open space" has never been defined as meaning unenclosed land. Where open spaces are referred to in connection with a town the expression always means spaces that are unbuilt upon. The whole paragraph is difficult to understand, except on the footing that the bracket had got shifted as suggested.

[TOMLIN J. I must deal with the paragraph as I find it.]

C. Harman in reply. If the view was adopted that any unbuilt on land was an open space within Part V., para. 2, the anomaly would arise that whenever property is held in undivided shares the unbuilt on portion would vest in the Public Trustee or only be saleable with the leave of the Court. This is a result which the Court should seek to avoid.

TOMLIN J. This application is made for the purpose of determining the true effect of para. 2 of Part V. of the First Schedule to the Law of Property Act, 1925. The Corporation of Bradford having made a housing scheme in respect of part of their area known as the White Abbey area, entered into an agreement for acquiring property in White Abbey Road from the owners. A difficulty has arisen in connection with the title by reason of there being behind two or more of the houses which are being acquired a small open yard in which there are certain conveniences used by the owners of the houses and over which the owners of the houses have rights of way,

TOMLIN J. 1927 BRADFORD CITY PREMISES, *In re.*

the yard itself being vested in the owners as tenants in common.

The particular provision which I have to consider is as follows: "Where, immediately before the commencement of this Act, an open space of land (with or without any building used in common for the purposes of any adjoining land) is held in undivided shares, in right whereof each owner has rights of access and user over the open space, the ownership thereof shall vest in the Public Trustee on the statutory trusts which shall be executed only with the leave of the Court, and, subject to any order of the Court to the contrary, each person who would have been a tenant in common shall, until the open space is conveyed to a purchaser, have rights of access and user over the open space corresponding to those which would have subsisted if the tenancy in common had remained subsisting." It is said that on one construction of that clause a yard such as this is "an open space of land . . . . held in undivided shares, in right whereof each owner has rights of access and user"; and therefore that it falls within that paragraph and is vested in the Public Trustee, who can only sell it in exercise of the statutory trusts with the leave of the Court. On the other hand it is said that this is a result which is so absurd, having regard to the nature and character of the property, that it is really incredible that the Legislature meant anything of the kind, and that I must put some restricted meaning upon the phrase "an open space of land."

My attention has been called to a number of definitions of "open space" in various Acts, but I am not satisfied that I get any assistance from them. They seem to me to be special definitions directed to the special purposes of the Acts in which they are to be found, and not to afford any assistance in the search for the natural meaning of the phrase "an open space of land" used in this Act without any definition of the term. I think I ought to put upon this phrase its natural meaning, except so far as I may be able to discover from the Act something which would restrain or extend that natural meaning.

I feel unable to put upon the phrase "an open space of land" any meaning which would really exclude this particular piece of land. It seems to me that the essential quality which is connoted by "an open space of land" is the quality of being unbuilt upon. That in my view is the essential quality, and it follows that para. 2 of Part V. of the First Schedule to the Act applies to any unbuilt upon space "(with or without any building used in common for the purposes of any adjoining land) . . . . held in undivided shares"; and I think the building there referred to means a building on the space.

I must hold that this paragraph applies to this particular land, that it is now vested in the Public Trustee upon the statutory trusts, and that those trusts can only be exercised or executed with the leave of the Court.

[His Lordship then authorized the sale of the property by the Public Trustee, subject to such rights (if any) as might be subsisting in persons other than the applicants.]

Solicitors: *Torr & Co., for N. L. Fleming, Bradford.*

H. C. G.

ASTBURY J.

1927

Nov. 18, 22, 23.

COLLAROY COMPANY, LIMITED *v.* GIFFARD.

[1927. C. 2960.]

Company—Winding up—Surplus Assets—Preference Shares—Priority as to Dividends and Capital—Right to participate—Memorandum—Articles—Construction.

A company's Memorandum (clause 5), after stating that the capita was 300,000*l.* divided into 10,000 Preference shares of 10*l.* each and 20,000 Ordinary shares of 10*l.* each, declared that such Preference shares should confer "the right" to a fixed cumulative preferential dividend at the rate of 5*l.* per cent. per annum on the capital paid up thereon and "shall rank" both as regards dividends and capital in priority to the Ordinary shares.

Article 11 provided that the Preference shares should confer "the right" to a fixed cumulative preferential dividend at the rate of 5*l.* per cent. per annum and "the right" in a winding up to repayment of capital in priority to the Ordinary shares:—

Held, on construction, that the Memorandum and Article contained an exhaustive delimitation of "the right" of the Preference shareholders, and that in the event of a winding up they would be entitled to a return of their capital, but not to participate in surplus assets.

Birch v. *Cropper* (1889) 14 App. Cas. 525; *In re Espuela Land and Cattle Co.* [1909] 2 Ch. 187; *Will* v. *United Lankat Plantations Co.* [1914] A. C. 11; *In re National Telephone Co.* [1914] 1 Ch. 755; *In re Fraser and Chalmers* [1919] 2 Ch. 114; and *Anglo-French Music Co.* v. *Nicoll* [1921] 1 Ch. 386 discussed and explained.

ORIGINATING SUMMONS.

The above company was registered on March 8, 1898, as a company limited by shares, to carry on farming business in New South Wales and other objects stated in the Memorandum.

The capital was 300,000*l.* divided into 10,000 Preference shares of 10*l.* each, of which 6670 were issued and fully paid, and 20,000 Ordinary shares of 10*l.* each, of which 13,340 were issued and fully paid.

The rights attached to the respective shares were defined by the Memorandum and Articles.

By the Memorandum, clause 5, the capital of the company is 300,000*l.* divided into 10,000 Preference shares of 10*l.* each and 20,000 Ordinary shares of 10*l.* each, and such Preference shares shall confer "the right" to a fixed cumulative preferential dividend at the rate of 5*l.* per cent. per annum on

the capital paid up thereon, and "shall rank," both as regards dividends and capital, in priority to the Ordinary shares. Upon any increase of capital, the company is to have power to issue any new shares with any preferential, defined, qualified, or special rights, privileges, or conditions attached thereto.

By article 11 the initial capital shall be divided into 10,000 Preference shares of 10*l.* each and 20,000 Ordinary shares of 10*l.* each, and the Preference shares shall confer "the right" to a fixed cumulative preferential dividend at the rate of 5*l.* per cent. per annum and "the right" in a winding up to repayment of capital in priority to the Ordinary shares.

On its incorporation the company acquired a large area of land in New South Wales and conducted farming thereon. From time to time considerable portions were sold and the company was about to sell the remainder. The purchase moneys were almost invariably payable by instalments over a considerable period, and it would be several years before they were all received so that the company's affairs could be wound up. It was however certain that in due course the company would be possessed of liquid assets which, after payment of all liabilities, would be far more than sufficient to repay the whole of the capital paid up on the Preference and Ordinary shares, and it had therefore become essential to determine the true rights of the Preference and Ordinary shareholders respectively.

On August 13, 1927, the company issued this summons to determine whether, upon the true construction of clause 5 of the Memorandum, in the event of a liquidation of the company the Preference shareholders would be entitled to participate rateably with the Ordinary shareholders in any distribution of surplus assets remaining after payment of all the company's liabilities and repayment of all capital paid up on the Preference and Ordinary shares.

Bischoff for the company.

Lionel Cohen for the Preference shareholders. The Preference shareholders are corporators and have the same rights

ASTBURY J. 1927 COLLAROY CO. v. GIFFARD.

as the Ordinary shareholders so far as not modified by the Memorandum and Articles: *Birch* v. *Cropper* (1); *In re Espuela Land and Cattle Co.* (2); *Will* v. *United Lankat Plantations Co.* (3); *In re Fraser and Chalmers* (4); *Anglo-French Music Co.* v. *Nicoll.* (5)

The contrary view indicated by Sargant J. in *In re National Telephone Co.* (6) has not been followed.

It is, of course, a question of construction of the particular Memorandum and Articles, and probably authorities are not of much use: *Will* v. *United Lankat Plantations Co.* (7) But certain general principles seem to be recognized—namely:

1. The members' rights are equal unless modified.

2. The right to dividend while the company is a going concern and the right to capital or surplus assets in a winding up are quite distinct: *Birch* v. *Cropper* (8); the *Lankat* case. (9)

3. The right to return of capital and the right to share in surplus assets are quite distinct.

Now here under clause 5 of the Memorandum the Preference shares have the right to a fixed cumulative preferential dividend and rank both as regards dividends and capital in priority to the Ordinary shares. That merely gives them priority as to dividends and capital. It does not touch the question of surplus assets. The same remark applies to article 11. It obviously means the right to repayment of capital in priority to any such repayment to the Ordinary shares.

Stamp for the Ordinary shareholders. I deny the major, namely, proposition 1, in toto. Preference shares are not born with full corporate rights, subject to modification by the Memorandum and Articles. They are a special creation of the Memorandum and Articles and prima facie have only the rights thereby given them expressly or by implication: the *Lankat* case. (10)

(1) 14 App. Cas. 525, 543, 546, 548.
(2) [1909] 2 Ch. 187, 193.
(3) [1912] 2 Ch. 571; [1914] A. C. 11.
(4) [1919] 2 Ch. 114.
(5) [1921] 1 Ch. 386.
(6) [1914] 1 Ch. 755.
(7) [1914] A. C. 15.
(8) 14 App. Cas. 548.
(9) [1912] 2 Ch. 580.
(10) [1912] 2 Ch. 579; [1914] A. C. 17.

If there is any ambiguity in the winding-up rights the Court should endeavour to harmonize them with the dividend rights: *Birch* v. *Cropper* (1); *Thornycroft & Co.* v. *Thornycroft.* (2)

The Preference shareholders have no more vested right to share in surplus assets in a winding up, than they have to share in surplus profits while the company is a going concern. In the latter case the right to a fixed preferential dividend prima facie excludes them: the *Lankat* case. (3) Why should not the same prima facie rule apply in the former case?

In the present case the preferred shareholders' rights are wholly preferential. Surely they cannot be entitled to share in the assets partly preferentially and partly pro rata.

The only real controversy in *Birch* v. *Cropper* (4) was whether the assets were distributable in proportion to the paid up or nominal capital. The rest is obiter. But Lord Herschell (5) obviously took the view that the maxim "Expressio unius exclusio alterius" applied to these cases.

In the *Espuela* case (6) Swinfen Eady J. said that there was no rule of law that shareholders having a fixed preferential dividend took that only. But prima facie they do, though the law does not prevent the contract giving them more.

In the *National Telephone* case (7) Sargant J. took my view of the right way to approach the question.

The actual decision in *In re Fraser and Chalmers* (8) is obviously right. But it differs toto caelo from the present case, where the Memorandum and Articles declare "the right" to dividends and capital uno flatu. There are five pointed differences:—

1. There is a single formula covering both dividends and capital.

2. The direction as to ranking in priority impliedly negatives any pari passu ranking.

(1) 14 App. Cas. 532, 533.
(2) (1927) 44 Times L. R. 9.
(3) [1914] A. C. 11.
(4) 39 Ch. D. 1; 14 App. Cas. 525.
(5) 14 App. Cas. 532.
(6) [1909] 2 Ch. 187, 193.
(7) [1914] 1 Ch. 755.
(8) [1919] 2 Ch. 114.

ASTBURY J. 1927 COLLAROY CO. v. GIFFARD.

3. There is nothing to imply that after repaying the Preference capital there is to be any return of capital eo nomine to any one.

4. There ought to be a logical consistency between the Preference shareholders' rights in a winding up, and their rights while the company is a going concern.

5. There is nothing pointing to any artificial distinction between assets required to repay capital and other assets.

No doubt the mere attachment to Preference shares of a priority to return of their capital in a winding up would prima facie not bar their participation in surplus assets, and if that is all the present contract does, cadit quaestio. But it is only necessary to read it, to see that it defines the entire rights and impliedly excludes any further rights.

In the *Anglo-French Music* case (1) the Preference shares were participating Preference shares, and the contract referred to repayment of capital both to Preference and Ordinary shares, giving the former priority. The balance, i.e. the surplus, if any, was left in the air.

Cohen in reply referred to the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 170, 186 (i.) (v.); *Underwood* v. *London Music Hall* (2); and *In re London India Rubber Co.* (3)

ASTBURY J. [after stating the facts:] The Ordinary and Preference shareholders have discussed the effect of various decisions during the last few years upon this sort of question. It is agreed that the question depends entirely upon the true construction of the Memorandum and Articles as regards the rights of the Preference shareholders, the point being whether the provision in the contract, i.e. the Memorandum and Articles, with regard to the rights of the Preference shareholders confers on them certain priorities only, leaving them their rights, so far as not expressly dealt with, as shareholders; or on the other hand, whether the provisions of the contract contain the whole of the rights conferred upon the Preference shares.

(1) [1921] 1 Ch. 386. (2) [1901] 2 Ch. 309.
(3) (1868) L. R. 5 Eq. 519.

I shall have to consider a number of decisions directly bearing on the point; but, before doing so, I will state a proposition that is unquestioned by either party. It is this. The annexation to Preference shares of a right to receive back their capital in a winding up in priority to the Ordinary shares does not prima facie exclude the Preference shareholders from participation in the ultimate surplus assets (if any). This proposition was affirmed by Swinfen Eady J. in the *Espuela* case (1), by myself in *In re Fraser and Chalmers* (2) and by Eve J. in the *Anglo-French Music* case. (3) It was perhaps doubted by Sargant J. in the *National Telephone* case. (4)

The Ordinary shareholders add that such a provision may be expressed in such a manner and in such a context that according to its true construction it does exclude Preference shareholders from such a participation, and the direct question I have to decide is whether the present contract does so exclude them. This proposition is undoubted. The only question is whether it applies here.

In the *Bridgewater Navigation* case (5), reported in the House of Lords sub nom. *Birch* v. *Cropper* (5), the resolution relating to the Preference shares was confined to dividend rights, and there was no provision as to what was to happen in a winding up. The real controversy was whether the assets were distributable in proportion to the paid up or the nominal capital.

Although the decision has no direct relevance to the matter in dispute here, the following dicta in the House of Lords have been relied on. Lord Herschell said (6): "The Companies Act affords very little assistance in terms towards a decision of the question. It provides that in the case of a voluntary winding up the property of the company shall be applied in satisfaction of its liabilities, and subject thereto shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according

(1) [1909] 2 Ch. 187.
(2) [1919] 2 Ch. 114.
(3) [1921] 1 Ch. 386.
(4) [1914] 1 Ch. 755.
(5) 39 Ch. D. 1, 4; 14 App. Cas. 525.
(6) 14 App. Cas. 530.

ASTBURY J. 1927 COLLAROY CO. v. GIFFARD.

to their rights and interests in the company. But this leaves undetermined what those rights and interests are." Further on, speaking of the Preference shareholders, he said (1): "They are members of the company, and as much shareholders in it as the Ordinary shareholders are; and it is in respect of their thus holding shares that they receive a part of the profits." Lord Macnaghten said (2): "Every person who becomes a member of a company limited by shares of equal amount becomes entitled to a proportionate part in the capital of the company, and, unless it be otherwise provided by the regulations of the company, entitled, as a necessary consequence, to the same proportionate part in all the property of the company, including its uncalled capital. He is liable in respect of all moneys unpaid on his shares to pay up every call that is duly made upon him. But he does not by such payment acquire any further or other interest in the capital of the company. His share in the capital is just what it was before. His liability to the company is diminished by the amount paid. His contribution is merged in the common fund. And that is all. When the company is wound up, new rights and liabilities arise. The power of the directors to make calls is at an end; but every present member, so far as his shares are unpaid, is liable to contribute to the assets of the company to an amount sufficient for the payment of its debts and liabilities, the costs of winding-up, and such sums as may be required for the adjustment of the rights of the contributories amongst themselves." Later on he said (3): "The Ordinary shareholders say that the Preference shareholders are entitled to a return of their capital, with 5 per cent. interest up to the day of payment, and to nothing more. That is treating them as if they were debenture-holders, liable to be paid off at a moment's notice. Then they say that at the utmost the Preference shareholders are only entitled to the capital value of a perpetual annuity of 5 per cent. upon the amounts paid up by them. That is treating them as if they were

(1) 14 App. Cas. 531. (2) 14 App. Cas. 543.
(3) 14 App. Cas. 546.

holders of irredeemable debentures. But they are not debenture-holders at all. For some reason or other the company invited them to come in as shareholders, and they must be treated as having all the rights of shareholders, except so far as they renounced those rights on their admission to the company. There was an express bargain made as to their rights in respect of profits arising from the business of the company. But there was no bargain—no provision of any sort—affecting their rights as shareholders in the capital of the company. . . . . I think it rather leads to confusion to speak of the assets which are the subject of this application as 'surplus assets' as if they were an accretion or addition to the capital of the company capable of being distinguished from it and open to different considerations. They are part and parcel of the property of the company—part and parcel of the joint stock or common fund—which at the date of the winding-up represented the capital of the company. It is through their shares in the capital, and through their shares alone, that members of a company limited by shares become entitled to participate in the property of the company."

I have read these passages because certain parts are relied upon in later cases.

Then there are four cases in which the rights of Preference shareholders to participate in "surplus assets in a winding-up," i.e. assets remaining after payment of debts and liabilities and return of the whole of the capital, have been discussed. The first is the *Espuela* case (1); the second is the *National Telephone* case (2); the third is *In re Fraser and Chalmers* (3); and the fourth is the *Anglo-French Music* case. (4) But in another case, namely, the *Lankat* case (5), though the decision was limited to dividend rights, there is a quantity of valuable information as to the rights of Preference shareholders generally.

In the *Espuela* case (1) Swinfen Eady J. decided that

(1) [1909] 2 Ch. 187.
(2) [1914] 1 Ch. 755.
(3) [1919] 2 Ch. 114.
(4) [1921] 1 Ch. 386.
(5) [1912] 2 Ch. 571; [1914] A. C. 11.

ASTBURY J. 1927 COLLAROY CO. v. GIFFARD.

having regard to the contract there, the Preference shareholders were entitled in the winding up, after the share capital had been repaid, to share rateably in the distribution of the assets that remained after that repayment. But having regard to the difference of opinion expressed in certain cases, and to the extremely able arguments in this case, it is necessary to consider very closely the exact terms of the contract in each of these cases. In doing so I propose to keep in mind the proposition which both parties assent to—namely, that the annexation to Preference shares of a right to receive back their capital in a winding up in priority to the Ordinary shares " prima facie " does not in itself exclude the Preference shares from participation in the ultimate surplus assets (if any).

In the *Espuela* case (1) the Memorandum provided that the Preference shares should carry a cumulative preferential dividend of 10*l.* per cent. per annum on the amount for the time being paid up thereon, and that they should also have a preferential right to be repaid the amount paid up thereon and interest out of the assets of the company on a winding up. The Articles provided that the Preference shares should be entitled to a preferential dividend out of the divisible profits in each year of 10 per cent. on the amount paid up thereon before any dividend was paid upon the Ordinary shares, with a provision for making good any deficiency out of subsequent profits. They also provided that in case the company should at any time be wound up, the Preference shares should be entitled to be paid out of the property and assets of the company the full amount of capital paid up thereon in preference and priority to and before any payment should be made thereout in respect of the Ordinary shares. Now that contract was consistent with its providing only for preference and not for delimitation of right. The Memorandum gave a preferential right and the Articles provided that the Preference shares on a winding up should be paid in priority to and before any payment should be made in respect of the Ordinary shares. Swinfen Eady J. having read the contract

(1) [1909] 2 Ch. 187.

said (1): "There remains the question how the assets which remain after paying Preference capital, interest thereon, and Ordinary capital are to be distributed. Mr. Younger, who claimed the whole surplus on behalf of the Ordinary shareholders, contended that where priority of repayment on a winding-up is secured to the Preference capital the Preference shareholder is entitled to that repayment, but not to any further interest in the capital of the company, in the same manner as where a right to a fixed preferential dividend is secured to Preference shareholders they take that fixed amount and nothing more, however large the revenue of the company may be. This, however, is merely a question of the construction of the Memorandum and Articles. There is not any rule of law that shareholders having a fixed preferential dividend take that only. It is quite open to a company to distribute its revenue first in paying a fixed preferential dividend, than in paying a dividend of a like amount to the Ordinary shareholders, and then dividing any surplus of any year rateably between the Preference and Ordinary shareholders."

Nobody quarrels with that. The question is merely one of construction and there is no rule of law which prevents the contract defining the rights of the Preference shareholders. Swinfen Eady J. construed the contract before him, as he was entitled to do, as not depriving the Preference shareholders of their rights as shareholders in the surplus assets which remained over from the winding up after the repayment of capital.

The Ordinary shareholders have rightly contended that a fixed return of capital to the shareholders in a winding up is just as artificial as a provision for a fixed dividend. They say that if the latter is regarded as exhaustive, there is no prima facie reason why the former should not be similarly regarded.

The next case is the *Lankat* case. (2) There, the company having been established in 1889, the following resolutions were passed at an extraordinary general meeting of July 13,

(1) [1909] 2 Ch. 193. (2) [1912] 2 Ch. 571; [1914] A. C. 11.

ASTBURY J. 1927 COLLAROY CO. v. GIFFARD.

1891: (1.) That the capital of the company be increased to 450,000*l.* by the creation of 50,000 new shares of 1*l.* each; (2.) That the new shares be called Preference shares, and that the holders thereof be entitled to a cumulative preferential dividend at the rate of 10 per cent. per annum on the amount for the time being paid up on such shares; and that such Preference shares rank, both as regards capital and dividend, in priority to the other shares.

Many years later, in July, 1909, new articles were approved, one being that "In the event of the winding up of the company the surplus assets shall be applied first in payment to the holders of the Preference shares of the amounts paid up on such shares together with a sum equivalent to any arrears of dividends, whether declared or undeclared, down to the commencement of the winding up; secondly, in payment to the holders of the Ordinary shares of the amounts paid up on such shares, and, subject thereto, shall be divided among the members in accordance with the amounts for the time being paid on the shares held by them respectively other than amounts paid in advance of calls."

I do not know that it is necessary to discuss how or why it was that the question of the rights of the Preference shareholders in a winding up was not dealt with. It did not arise in the sense that there was a winding up, because the company was a going concern, and I believe is so still. But the relevance of this provision as to capital was not directly discussed. It may be that it was uncertain at the time whether the new 1909 articles had affected or destroyed the provisions of the 1891 resolutions as to the rights in a winding up. At all events the decision was limited to the dividend rights. (1)

Cozens-Hardy M.R. said (2): "Now what is the ordinary prima facie meaning of Preference shares having a fixed dividend, fixed in this sense, that it does not vary with the

(1) It was admitted before Joyce J. that the surplus assets in a winding up went to both classes of shareholders. It was also admitted that if the new articles in fact altered the Preference shareholders' rights, the circular accompanying the notice of the 1909 meetings was misleading, and they could not stand. See House of Lords Appendix. Bar Library Collection, vol. 247, pp. 76–83.

(2) [1912] 2 Ch. 576.

profits of the year, but it is a fixed dividend of 10 per cent. per annum? It seems to me that the ordinary meaning is that that resolution defines and limits the dividend which a Preference shareholder can take." He then approved of a passage in Palmer's Company Precedents, 11th ed., part 1, p. 814, to this effect: "It is generally assumed that where the Preference shares are given a fixed preferential dividend at a specified rate, that impliedly negatives any right to take any further dividend, and probably this assumption is well founded," and said that the assumption was well founded. Farwell L.J. agreed with Cozens-Hardy M.R., but it is suggested that he perhaps went too far in saying (1): "To my mind the considerations affecting capital and dividend are entirely different. The preference given to capital is in the winding-up, and the preference claimed to be given to dividend here is in a going concern; and I do not think that you can reason from what will happen to capital in a winding-up to what ought to happen to dividend while the company is a going concern," and then he adds: "As to what may happen in a winding-up I express no opinion."

Now it seems plain that different considerations may, and to some extent do, affect the respective questions of capital preference and dividend preference. But whether the considerations affecting them are "entirely different" is a question of some difficulty.

The *Lankat* case (2) went to the House of Lords, which affirmed the Court of Appeal. Lord Haldane L.C. said (3): "This appeal raises a question of great interest from a business point of view, but it is difficult to see how it can be said to raise any question of general legal principle. The point in dispute is one of construction." Later on he said (4): "Your Lordships will observe that the second resolution gave the authority to make the bargain and defined the terms which the bargain was to contain. A shareholder comes to the company and says: 'I wish to contract with you for a share in your capital and so to become a shareholder.'

(1) [1912] 2 Ch. 580.
(2) [1914] A. C. 11.
(3) [1914] A. C. 15.
(4) [1914] A. C. 16.

ASTBURY J. 1927 COLLAROY CO. v. GIFFARD.

He advances his money and the terms are contained in the bargain that is made between him and the company on the issue of the share to him, and that bargain is that he is to receive a cumulative preferential dividend at the rate of 10 per cent. on the amount paid up on his share and that his Preference share is to rank both as regards capital and dividend in priority to other shares. My Lords, I should have thought "—now this is the important passage—" that if we were dealing with an ordinary case of two individuals coming together, and if a document were produced saying 'you are to have a cumulative preferential dividend of 10 per cent.' or whatever might be the equivalent in the circumstances of the bargain, it would be naturally concluded that that was the whole of the bargain between the parties on that point. You do not look outside a document of this kind in order to see what the bargain is; you look for it as contained within the four corners of the document." A little lower down he said (1): "My Lords, I think that Farwell L.J. (2) called attention to what is really a cardinal consideration in this matter. Shares are not issued in the abstract and priorities then attached to them; the issue of shares and the attachment of priorities proceed uno flatu; and when you turn to the terms on which the shares are issued you expect to find all the rights as regards dividends specified in the terms of the issue."

There the matter ended, but the Ordinary shareholders contend that Lord Haldane's view as to the whole bargain being prima facie contained in the document applies just as much to the bargain as to the return of capital in a winding up, as to the amount and character of the dividend to be paid by the company as a going concern.

The next case is the *National Telephone* case. (3) Sargant J. decided that case on the particular bargain in the memorandum and articles, but he probably leaned to the view that where the contract states the rights of the Preference shareholders, both as to dividend and in the winding up, that is "prima

(1) [1914] A. C. 17. (2) [1912] 2 Ch. 579.
(3) [1914] 1 Ch. 755.

facie " the whole and only bargain between them. On the contract before him he decided that the Preference shareholders took only the rights expressly given to them.

In *In re Fraser and Chalmers* (1) which, as a decision of my own, I find more difficult to deal with, I held that a provision merely giving Preference shareholders priority for repayment of their capital in a winding up, did not negative their ordinary right as corporators to participate in the ultimate surplus assets. Now as far as the contract there was concerned, I am of opinion that my decision was correct, and the Ordinary shareholders in their extremely able and lucid argument do not quarrel with it. The contract is set out in the report and the relevant parts of it are that the Preference shareholders were to have the special rights and privileges there set out. The first was the right to a fixed cumulative preferential dividend of 7½ per cent. per annum on the capital for the time being paid up on those shares; secondly, when the profits of the company in any year should be more than sufficient to pay that preferential dividend and also a dividend at the same rate on the Ordinary shares, the holders of the Preference shares should be entitled to participate in any further dividend that might be paid in any such year. In other words these were fixed preferential participating Preference shares. Then the contract provided that in the event of the winding up of the company, the holders of the Preference shares should have " a " preferential right as regards repayment of capital and otherwise as thereinafter mentioned and should be entitled to have the surplus assets applied, first in paying off the capital paid up on the Preference shares, and secondly, in paying off the arrears (if any) of the preferential dividend before any return of capital was made to the holders of the other shares.

Now in that case the rights of the Preference shares to profits during the time that the company was a going concern were, subject to their preference, the same as those of the Ordinary shareholders; and in a winding up there is a probability that the contract providing for their interest

(1) [1919] 2 Ch. 114, 116, 117.

ASTBURY J.
1927
COLLAROY Co. v. GIFFARD.

in the winding up should have some sort of relation to their interest in the company while it was a going concern.

The contract provided two things: (1.) that the preferential right should be "a right" and not "the right" of the Preference shares, and (2.) that they should have their capital repaid before any repayment of capital was made to the Ordinary shareholders. I think that meant that in a winding up, if the assets were sufficient, there were to be two classes of repayment of capital as such, one to Preference shares and one to Ordinary shares. I held, and I think rightly, that on the true construction of that contract, there was no taking away from the Preference shareholders of their right as shareholders to participate in the final surplus in the winding up. I will now read those portions of my judgment that I still think accurate.

I said (1): "All shareholders are entitled to equal treatment unless and to the extent that their rights in this respect are modified by the contract under which they hold their shares." That is right. I also said (2): "The dividend clause provides for the exhaustion of an annual distributable sum, whereas the capital clause merely provides for the order in which certain of the company's obligations are to be met in a winding up." That also is right. A little lower down I said (2): "No reference is made to any remaining assets after the capital is repaid to all the shareholders, and no provision is made depriving the Preference shareholders of their rights as corporators with regard thereto." That I think is right, and the next sentence is also right as applied to the contract in that case. "It seems to me impossible to say that, because it is provided that certain debts of the company shall be paid in a winding up in a particular order, a fund remaining after doing so which is not expressly, nor by implication, referred to at all, and which forms part of the general assets of the company, shall be divided between some, to the exclusion of other, shareholders." That sentence would be improved by reading "on the true construction" instead of "by implication." I then

(1) [1919] 2 Ch. 120. (2) [1919] 2 Ch. 121.

cited (1) a passage from Swinfen Eady J.'s judgment in the *Espuela* case (2)—namely, "This, however, is merely a question of the construction of the memorandum and articles. There is not any rule of law that shareholders having a fixed preferential dividend take that only." That is entirely consistent with the Ordinary shareholders' contention here. Then I turned to the *National Telephone* case (3) and cited (4) the following passage (5): "I should have thought that, as a matter of ordinary construction, not only from the business point of view but from the legal point of view, the express mention of the rights which the Preference shareholders were to be entitled to in a winding up would have operated as an exclusion of any further or other rights." I think, as I then said, that it depends on the language used. Of course if Sargant J. meant "the express statement of the right" instead of "the rights," his statement is a truism. Then I cited (6) another passage from Sargant J.'s judgment in the *National Telephone* case. (5) He said: "Similarly here I should have thought, in a matter which is specially dealt with by the terms of the issue of the shares, that those terms of issue would have fully defined the terms of issue, and would not have been a mere modification of certain anterior or antecedent rights which might be supposed to appertain to the shares as shares." I made the same observation as before, but of course Sargant J.'s statement is necessarily right if the terms of the contract cover all the terms of issue. Lower down I said (6): "Speaking for myself I think Swinfen Eady J."—in the *Espuela* case (7)—"intended, and rightly, to lay down that in the absence of provision to the contrary the shareholders' rights are equal." I adhere to that.

I then referred (8) to a further statement by Sargant J. in the *National Telephone* case (9), where he said: "Looking

(1) [1919] 2 Ch. 122.
(2) [1909] 2 Ch. 193.
(3) [1914] 1 Ch. 755.
(4) [1919] 2 Ch. 125.
(5) [1914] 1 Ch. 771.
(6) [1919] 2 Ch. 126.
(7) [1909] 2 Ch. 187.
(8) [1919] 2 Ch. 127.
(9) [1914] 1 Ch. 773.

ASTBURY J. 1927 COLLAROY Co. v. GIFFARD.

at the way in which Swinfen Eady J. dealt with the question of the rights of winding up, as being analogous to the similar rights to dividend while the company is a going concern "— I am not sure that that does not require a little qualification—" and looking to the canon of construction which was applied by the Court of Appeal in *Will* v. *United Lankat Plantations Co.* (1) it appears to me that the weight of authority is in favour of the view that, either with regard to dividend or with regard to the rights in a winding up, the express gift or attachment of preferential rights to Preference shares, on their creation, is, prima facie, a definition of the whole of their rights in that respect, and negatives any further or other right to which, but for the specified rights, they would have been entitled." Now in the report (2) I am made to dissent from that. I have now come to the conclusion and I desire to express it plainly that I was wrong in so dissenting. The passage I have just read is right, because it states that " the express gift or attachment of preferential rights, etc.," is prima facie a definition of the whole of their rights.

I may add that in ordinary cases there must be a context. Sargant J. is dealing with a prima facie effect, but in ordinary cases there is a context. In *In re Fraser and Chalmers* (2) it seemed difficult to discuss in the abstract a point that must necessarily depend upon the exact language and context of the contract in each case. Of course if the language used is capable of being construed as an exhaustive delimitation of the whole right, I agree with Sargant J.

I do not think that the decision in *In re Fraser and Chalmers* (2) conflicts with any of the Ordinary shareholders' propositions; and I think that every fact on which their argument in the present case was based was absent from the contract in *In re Fraser and Chalmers.* (3)

Their five propositions are :—

1. There is a fixed formula extending to dividend and to capital.

(1) [1912] 2 Ch. 571. (2) [1919] 2 Ch. 128.
(3) [1919] 2 Ch. 114.

2. There is an unqualified direction as to the Preference shares ranking in priority over the Ordinary shares which is inconsistent with their ranking partly pari passu with them.

3. There is an absence of anything implying that after paying the capital to the Preference shares there is to be any return of capital eo nomine to any one.

4. There ought to be a logical consistency between the Preference shareholders' rights while the company is a going concern and their rights in a winding up.

5. There is an absence of anything pointing to any artificial distinction in the winding up between assets required to refund capital and surplus or other assets.

Each of these points was absent in *In re Fraser and Chalmers*. (1)

The last case is *Anglo-French Music Co.* v. *Nicoll*. (2) On the construction of the contract there Eve J. held that the giving of a preference to the Preference shareholders did not exhaust their rights and that they were entitled as in the *Espuela* case (3) and *In re Fraser and Chalmers* (1) to rank pari passu with the Ordinary shareholders in a winding up in respect of the ultimate surplus. The contract in the Memorandum, clause 5, was as follows: "The capital of the company is 5000*l*. divided into 1000 Ordinary shares of 1*l*. each, and 4000 Cumulative Preference shares of 1*l*. each. The said Preference shares shall entitle the holders thereof respectively to a fixed cumulative dividend at the rate of 7*l*. per cent. per annum on the amount for the time being paid up thereon, and to the repayment of capital before any dividend is paid or capital is repaid to the holders of the said Ordinary shares, and to a further dividend calculated at the rate of $\frac{1}{4}$ of every 1 per cent. paid upon the Ordinary shares in any one year over and above 10 per cent."

Now these shares were again participating Preference shares, and there was a definite reference in the contract to the repayment of capital to the Ordinary shares, after the

(1) [1919] 2 Ch. 114. (2) [1921] 1 Ch. 386.
(3) [1909] 2 Ch. 187.

ASTBURY J. 1927 COLLAROY CO. v. GIFFARD.

Preference shares had been repaid their capital. On the true construction of that contract, even accepting the present Ordinary shareholders' argument to the full, Eve J. was quite entitled to hold that the preferential rights were given by way of priority and not by way of delimitation.

There is nothing, however, in Eve J.'s decision to compel me to construe the present contract in the same way. That being so I have merely to construe the present bargain in accordance with the true effect of the decisions. The Preference shareholders agree that the question is one of construction. They also agree with the Ordinary shareholders' five points, but they say that on the true construction of the present contract, the words are words of priority only and are unsuitable as words of exhaustive delimitation. They contend that the words "rank in priority" in the Memorandum, clause 5, are not suitable as an expression intended to exclude the Preference shareholders from any further shareholding interest after the "rank in priority" is satisfied.

I must construe the contract as well as I can, paying due regard to the arguments and authorities. There is no very substantial difference between the Memorandum clause 5 and article 11. The contract in one sentence purports to define "the" right of the Preference shareholders. Clause 5 of the Memorandum says that the Preference shares shall confer "the" right to a fixed cumulative preferential dividend at the rate of 5 per cent. per annum on the capital paid up thereon and shall rank both as regards dividend and capital in priority to the Ordinary shares, and article 11 says that the Preference shares shall confer "the" right to a fixed cumulative preferential dividend at the rate of 5 per cent. per annum and "the" right in a winding up to repayment of capital in priority to the Ordinary shares.

The construction of this contract is by no means easy but, having given the best attention I can to the authorities, I have come to the conclusion that on its true construction there is one provision and one provision only as to the Preference shares. The right conferred upon them is referred to as "the" right, and I cannot find any of the distinguishing

features of the *Espuela* case (1); *In re Fraser and Chalmers* (2); or the *Anglo-French Music* case (3), which enabled the Courts there to construe the contracts as limited to priority and not as exhaustive delimitations of rights.

In the present case, having regard to the authorities, I think I ought to hold that on the true construction of the present contract there is one statement as to the rights of the Preference shareholders in dividend and capital, which statement ought to be regarded as a statement of their whole right and not merely as a statement of their priority right. The question in the summons will be answered accordingly. The Preference shareholders do not require any leave to appeal.

Solicitors: *Wigan & Co.; Williams & James.*

G. R. A.

In re BRIDGETT AND HAYES' CONTRACT.

[1927. B. 1203.]

Settled Land—Settlement—Determination on Death of Tenant for Life—Grant of Probate to Executor of Tenant for Life—Sale of settled Land by Executor—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 204, *sub-s.* 1—*Administration of Estates Act*, 1925 (15 *Geo.* 5, *c.* 23), *ss.* 1, 3, 22, *sub-s.* 1; 23, 24, 37, *sub-s.* 1; 55, *sub-s.* 1 (*xi.*).

Sect. 22, sub-s. 1, of the Administration of Estates Act, 1925, does not apply where, upon the death of a tenant for life, a settlement, previously existing, comes to an end. The legal estate in land vests in the person to whom a general grant of probate has been made, and he can give a good title thereto.

Under the will of C. S., E. M. T. was, on January 1, 1926, and at the date of her death, tenant for life of settled land, and J. J. was the sole surviving trustee of the settlement. By her will E. M. T. appointed T. W. B. to be the sole executor thereof, and after her death he was given a general grant of probate. On the death of E. M. T. the settlement came to an end:—

Held, that T. W. B. could, without the concurrence of J. J., give a good legal title to the land, the subject of the settlement under the will of C. S.

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(1) [1909] 2 Ch. 187. (2) [1919] 2 Ch. 114.
(3) [1921] 1 Ch. 386.

ROMER J. 1927 BRIDGETT AND HAYES' CONTRACT, *In re.*

By her will dated March 18, 1875, Caroline Stoneley appointed three trustees and devised her real estate and the residue of her personal estate to her trustees upon trust to pay the rents and profits thereof to her niece, E. M. Bridgett, for her separate use independently of any husband she should marry, and from and after her death upon trust for her children (if any), and if (as happened) she should die without leaving a child or children living at her death upon trust for sale as therein mentioned. Caroline Stoneley died on March 19, 1875. On November 5, 1888, E. M. Bridgett married one William Thornley. Two of the trustees of the will died in 1891. By her will dated February 6, 1922, E. M. Thornley appointed T. W. Bridgett to be the sole executor thereof. On January 1, 1926, E. M. Thornley was tenant for life, and John Jackson was the sole trustee of the will. E. M. Thornley died on January 17, 1926, and a general grant of probate of her will was made to T. W. Bridgett. By a contract in writing dated December 15, 1926, T. W. Bridgett (who therein was expressed to be contracting to sell as personal representative) agreed to sell, and G. W. Hayes agreed to purchase, certain leasehold premises forming part of the trust estate held under the will of C. Stoneley. On January 21, 1927, by a deed of appointment, J. Jackson appointed T. W. Bridgett and May Bridgett to be new trustees in the place of the two deceased trustees, and of him, J. Jackson, who wished to retire from the trust, and the trust premises were vested in the new trustees for all such estate and interest as the retiring trustee had therein. The purchaser objected to the title on the ground that J. Jackson, as surviving trustee for the purposes of the Settled Land Act, 1925, of the settlement subsisting under the will of C. Stoneley, must be deemed to have been appointed by E. M. Thornley, the tenant for life, as her special executor in relation to the settled land; that the legal estate in the property was vested in him as such special executor; and that accordingly title could not be made until the following steps were taken—namely: (1.) The grant of probate to E. M. Thornley's

executor was revoked, so far as relating to the settled land. (2.) A regrant of probate, limited to the settled land, was made to J. Jackson. (3.) J. Jackson, as special executor, assented to the vesting of the property in T. W. Bridgett and May Bridgett as trustees for sale, or joined with such trustees in assigning the property to the purchaser. The vendor contended that J. Jackson was not at the death of E. M. Thornley a trustee of the settlement for the purposes of the Settled Land Act, 1925, and the legal estate or term in the property was not vested in him as a special executor of E. M. Thornley. He also contended that as he had obtained a general unlimited grant of probate to the estate of E. M. Thornley, (*a*) he was her personal representative with respect to the settled land so long as that grant remained unrevoked and unvaried; (*b*) a good title to the property could be made, (*i*) by an assent in writing by himself to the vesting of the property in himself and May Bridgett as the present trustees of the will of C. Stoneley upon trust for sale, and by a subsequent assignment of the property by them to the purchaser; or (*ii*) by an assignment of the property to the purchaser by the vendor alone as such personal representative. This application was made by the purchaser, and it asked for a declaration that the objections to the title had not been sufficiently answered, and that a good title to the property had not been shown.

G. P. Slade for the purchaser. The legal estate became vested in Mrs. Thornley on January 1, 1926, and was so vested at the date of her death, and there was then a trustee of the settlement. After her death a grant of probate was given to a general executor. The question now to be decided is whether the general executor can convey the legal estate in the settled property. Sect. 1, sub-ss. 1 and 3, of the Administration of Estates Act, 1925, provides for real estate devolving on the personal representative of a deceased person, who is entitled to an interest not ceasing on his death. By s. 3, sub-s. 1 (ii.), settled land is expressly included in the definition of "real estate." Under s. 55, sub-s. 1 (xi.),

ROMER J.
1927
BRIDGETT AND HAYES' CONTRACT, *In re.*

"personal representative" means "the executor, original or by representation, or administrator for the time being of a deceased person," and "executor" includes a person deemed to be appointed executor as respects settled land. In this case the grant to the vendor, in respect to the settled land, was wrong. The settlement trustee must be deemed to have been appointed executor by virtue of s. 22, sub-s. 1, and the settled estate vested in him at once on the death of the tenant for life. He cannot, however, deal with it without a grant of probate, for this is clearly required by the Act. The words in the last paragraph of s. 22, sub-s. 1, "settled previously to his death," are put in to catch settlements that are not continuing: *In re James.* (1) Sect. 23 only applies to continuing settlements, and may apply to persons who become trustees after the death of the tenant for life. Further, the purchaser having notice that there has been an irregular grant of probate cannot be said to be acting in "good faith" within the meaning of the definition of purchaser in s. 55, sub-s. 1 (xviii.), and therefore will not be protected under s. 27, sub-s. 1, or s. 37. The vendor is neither an original nor a representative executor within the meaning of s. 55, sub-s. 1 (xi.) He cannot give a good title to the property contracted to be sold.

Watmough for the vendor. In the first place s. 37 of the Administration of Estates Act, 1925, affords a complete answer to the purchaser's objection. Under that section a person to whom a grant has been made can confer a good title on a purchaser, irrespective of whether he is the proper person to obtain a grant or not. That section gives statutory effect to the judgment of Buckley L.J. in *Hewson* v. *Shelley.* (2) Moreover the grant itself is conclusive: s. 204 of the Law of Property Act, 1925. Even if the legal estate was in the trustees of the settlement prior to the grant under s. 22 of the Administration of Estates Act, 1925, it would be immaterial: see *Hewson* v. *Shelley.* (2) The decision in *In re Pawley and London and Provincial Bank* (3) is nullified

(1) (1926) 62 L. J. Newsp. 475. (2) [1914] 2 Ch. 13, 31 et seq.
(3) [1900] 1 Ch. 58.

by s. 8, and the reasoning in that case could not stand in view of *Hewson* v. *Shelley*. (1)

In the second place the grant was, in fact, properly made to the executor without excluding settled land; s. 22 applies only where the land continues to be settled after the death of the tenant for life. Sects. 22, 23 and 24 constitute a code dealing with the special personal representatives. Sect. 23, relating to the appointment of additional special personal representatives, clearly applies only where there is a continuing "settlement" within the meaning of the Settled Land Act, 1925. In *In re James* (2) there appears to have been no continuing settlement, and therefore s. 23 did not apply. Sect. 24, expressly authorizing the special personal representatives to sell settled land, can only refer to land which is settled land when the sale is made. It follows that none of the provisions relating to the appointment of special personal representatives are intended to apply, unless there is a continuing settlement after the death of the tenant for life.

In the third place, even if it is impossible so to limit the words of s. 22, the only persons entitled to apply for a grant are the trustees of the settlement. If there is no settlement within the meaning of the Settled Land Act, 1925, at the date of the application there can be no "trustees of the settlement" who are entitled to a grant. On any view of the matter the vendor has shown a good title.

ROMER J. It is common ground that up to the date of her death Mrs. Emily Margaret Thornley, who was the tenant for life of the property now in question, had vested in her the legal estate in the property. It is common ground that, that being so, on her death this legal estate passed to her personal representative by virtue of sub-ss. 1 and 3 of s. 1 of the Administration of Estates Act, 1925. But then it is said that by virtue of s. 22, sub-s. 1, of that Act, in such a case as this the lady must be deemed to have appointed as her special executor in regard to this land the person who up to the date of her death was sole surviving

(1) [1914] 2 Ch. 13, 31 et seq. (2) 62 L. J. Newsp. 475.

ROMER J. 1927 BRIDGETT AND HAYES' CONTRACT, *In re.*

trustee for the purposes of the Settled Land Act. Let me assume that that was so. On January 17, 1926, she died, and on April 7, 1926, a general grant of probate of her will was made to Thomas William Bridgett, a person whom she had thereby appointed as executor. As from that date, at any rate, wherever the legal estate in this property may have been as between the date of her death and this act of probate, the legal estate in this land vested in Thomas William Bridgett, and, while that act of probate remains unrevoked, he can in my opinion properly convey the legal estate to the purchaser. Sect. 204 of the Law of Property Act, 1925, sub-s. 1, says this: "An order of the Court under any statutory or other jurisdiction shall not, as against a purchaser, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not." Sect. 22, sub-s. 1 (if the purchaser is right as to its application at all to this case), provided that probate might have been granted to this sole surviving trustee. In point of fact the Court of Probate did not grant probate to him, but granted probate to Thomas William Bridgett. That being so, it appears to me that s. 204 of the Law of Property Act applies to the case with regard to the taking of a conveyance from the legal personal representative. Further, the purchaser would be protected in the event of any subsequent revocation of that grant of probate by s. 37, sub-s. 1, of the Administration of Estates Act, 1925. It can hardly be doubted that in this case, if the purchaser does take a conveyance from the person to whom the grant of probate was granted, he would be acting in good faith, within the meaning of s. 55, sub-s. 1 (xviii.), of the Act.

The only difficulty I think as regards that point is caused by sub-s. 1 (xi.) of the last mentioned section, which says: "'Personal representative' means the executor, original or by representation, or administrator for the time being of a deceased person." At present the only executor of this deceased person is Thomas William Bridgett. But then it adds: "and 'executor' includes a person deemed to be

appointed executor as respects settled land." I think however that these later words only refer to the case where in the circumstances it is proper that the word "executor" should be so read as to include a person deemed to be appointed executor as respects settled land, and that the definition when read in connection with s. 1 cannot have the effect of vesting in the person who is deemed to be appointed special executor the legal estate in settled land where the Court of Probate has granted general administration to somebody else.

The point still remains as to whether s. 22, sub-s. 1, applies to the present case, it being conceded on both sides that on the death of this lady the settlement came to an end. Let me read the words of s. 22, sub-s. 1: "A testator may appoint, and in default of such express appointment shall be deemed to have appointed, as his special executors in regard to settled land, the persons, if any, who are at his death the trustees of the settlement thereof, and probate may be granted to such trustees specially limited to the settled land." Then follow these words: "In this sub-section 'settled land' means land vested in the testator which was settled previously to his death and not by his will." Sect. 22 is the first of three sections which are introduced under the general heading "Special Provisions as to Settled Land." In ss. 23 and 24 it is I think reasonably clear that "settled land" means land which after the death of the testator continues to be settled land, and the words in s. 22, sub-s. 1, "'settled land' means land vested in the testator which was settled previously to his death and not by his will" refer in terms only to that particular sub-section. I cannot help thinking that these words were merely designed for the purpose of making it clear that s. 22, sub-s. 1, did not apply to a case where the land was settled by the will of a testator. However, I have to deal with the words as I find them, and that being so I must read the earlier part of the sub-section as follows: "A testator may appoint and in default of such express appointment shall be deemed to have appointed as his

ROMER J. 1927 BRIDGETT AND HAYES' CONTRACT, *In re.*

special executors in regard to land vested in the testator which was settled previously to his death the persons if any who are at his death the trustees of the settlement thereof." So far down to the words "previously to his death" the section applies to the present case, because here land was vested in the testatrix and it had been settled previously to her death. Then the sub-section says she shall be deemed to have appointed as her special executors the persons, if any, who are at her death the trustees of the settlement. Now before any one can go to the Court of Probate and get probate specially limited to the settled land granted to him, he must be in a position to say to the Court that he is to be deemed to have been appointed special executor of this land, because at the death of the testator he was trustee of the settlement thereof. But in my opinion he is not in a position to make that statement if the settlement comes to an end the moment the testator dies. It is to be observed that the sub-section does not refer to the persons who immediately before the death of the testator were the trustees of the settlement, but to the persons who at his death are the trustees of the settlement.

The words "persons who are at his death the trustees of the settlement" connote to my mind persons who are trustees notwithstanding his death, especially when it is realized that the section is dealing with the testator's will, which comes into operation only when he is dead.

For these reasons I think this sub-section does not apply in a case like the present, where, upon the death of the testatrix in question, the settlement existing up to that date comes to an end.

Solicitors for purchaser: *Hedley Norris & Co., for Cumberbirch & Co., Macclesfield.*

Solicitors for vendor: *Downer & Johnson, for W. H. Stoddard, Birmingham.*

P. J. B.

CAERPHILLY URBAN DISTRICT COUNCIL *v.* GRIFFIN.

RUSSELL J.

1927

Dec. 6, 7.

[1926. C. 3231.]

Electricity—Local Authority authorized to supply—Right of Individual to supply within Area—Business not primarily that of Supply of electrical Energy to Consumers—Electric Lighting Act, 1909 (9 *Edw.* 7, *c.* 34), *s.* 23.

The defendant was a draper carrying on business in a building which he had erected on a site which he was in the course of developing. On the same site he built shops and a covered market containing a number of stalls. He let the shops and stalls to various traders, and installed electric plant for the supply of electrical energy for himself and his tenants. He was not authorized to do so by Act of Parliament, or by licence or Provisional Order in terms of the Electric Lighting Acts. The site was within the area within which the plaintiffs were the local authority authorized to supply electricity:—

Held, that the supply of electrical energy was only incidental to the defendant's business as a draper and the business of developing his property, and was not forbidden by s. 23 of the Electric Lighting Act, 1909.

WITNESS ACTION.

The plaintiffs, as undertakers for the purposes of the Caerphilly Electricity Special Order, 1922, were authorized to supply electricity for all public and private purposes, as defined by the Electric Lighting Acts, 1882 to 1909, in the area of supply mentioned in the First Schedule of the Order. The defendant bought an island site within the area, on which he erected a number of buildings and a covered-in market containing sixty stalls. The ground floor of the buildings the defendant let as shops except two, where he carried on the business of a draper. The defendant lived over his shops. The market stalls were let to various traders. On the site the defendant had an electric generating plant, from which he supplied current to light the shops, the market and stalls, and his own premises. He was not authorized to do so by Act of Parliament, licence or Provisional Order in terms of the Electric Lighting Acts. The defendant entered into contracts with his tenants to supply them with current, and stated that, subject to the result of this action, as he further developed the site he intended to put in three more

RUSSELL J. 1927. CAERPHILLY URBAN COUNCIL v. GRIFFIN.

plants to produce electric light and power. The plaintiffs alleged that in supplying electrical energy to the tenants of his premises the defendant was infringing s. 23 of the Electric Lighting Act, 1909, and asked for an injunction to restrain him from doing so.

Sect. 23 provided: "Where in any area a local authority, company, or person is authorised to supply electricity under Act of Parliament or under licence or Provisional Order granted under the Electric Lighting Acts, it shall not, after the passing of this Act, be lawful for any other local authority, company, or person to commence to supply or distribute electricity within the same area unless such supply or distribution is authorised by Act of Parliament, or by licence or Provisional Order granted in terms of the Electric Lighting Acts: Provided that this section shall not prevent any company or person from affording a supply of electrical energy to any other company or person where the business of the company or person affording the supply is not primarily that of the supply of electrical energy to consumers. . . . ."

Bennett K.C. and *R. W. Turnbull* for the plaintiffs. The section was framed to prevent competition between authorized and unauthorized undertakers, and the defendant's action in supplying electrical energy is unlawful unless he is protected by the proviso. The defendant has two distinct businesses, that of a draper and that of supplying electrical energy to his tenants for reward. In order to come within the proviso a person must be carrying on a business and generating electricity for the purpose of that business, and he is not protected if he develops more energy than he requires for his business and supplies others. The section contemplates a trading business and not the business of developing a property.

Gavin Simonds K.C. and *A. P. Vanneck* for the defendant. It is a question of fact in each case if a person's business is primarily that of supplying electrical energy. If the defendant confined his supply of energy to the premises occupied by himself he would clearly come within the proviso, and it is

submitted he is also protected when supplying energy to his premises although they are temporarily occupied by others, his tenants. The defendant has purchased a plot of land which he is developing, and the supply of energy is ancillary to the ownership and management of his property.

RUSSELL J. In this action a local authority, authorized to supply electricity within a specified area, seeks to restrain the defendant from infringing its monopoly within that area, and raises a point on which there is no authority—namely, the application of s. 23 of the Electric Lighting Act, 1909. [His Lordship read the section.] That section is a monopoly section and should therefore be scanned strictly. The words must be fairly construed, but if there is any doubt about them, the leaning should be against the monopoly. What I have to determine is whether the facts of this case bring, or fail to bring, the defendant within the proviso. Now here the proviso is this: "Provided that this section shall not prevent any . . . . person"—I am omitting the immaterial words—"from affording a supply of electrical energy to any other company or person where the business of the . . . . person affording the supply is not primarily that of the supply of electrical energy to consumers."

The question I have to answer in this case is this: Is the business of Mr. Griffin primarily that of the supply of electrical energy to consumers? If it is not, he is within the proviso and is not hit by the section.

In my opinion his business is not, upon the facts of this case, primarily that of the supply of electrical energy to consumers. His business is a two-fold business, in my opinion. His business is composed of a drapery business and the business of developing his property. In the course of those two businesses, as regards the drapery business, he provides his plant to light his business premises, and in the course of developing his property, which he has acquired for the purpose of turning part of it to profit by developing it as a market, he wishes to light that market, and he provides plant for that purpose; and for the purpose of attracting tenants, he

RUSSELL J. 1927 CAERPHILLY URBAN COUNCIL v. GRIFFIN.

supplies electricity to his tenants. He is supplying electricity as a matter ancillary to his position as a drapery stores owner and as an owner of property which he wishes to develop. It would be wrong, in my opinion, to hold that the business of the person affording the supply here, that is to say, Mr. Griffin, is primarily that of the supply of electrical energy to consumers.

The action fails and must be dismissed.

Solicitors: *Wrentmore & Son, for Spickett & Sons, Caerphilly; John T. Lewis & Woods, for R. R. Morgan, Cardiff.*

J. B. B. M.

RUSSELL J. 1927 *Dec.* 8.

CREDITON GAS COMPANY *v.* CREDITON URBAN DISTRICT COUNCIL.

[1927. C. 1894.]

Contract—Duration—Indefinite in Point of Time—Implication that Contract not intended to be perpetual—Determination by Notice.

By an agreement under seal dated March 30, 1909, between the Crediton Gas Company and the Crediton U. D. C. the former agreed to light all the public lamps within the district "from and after the first day of September in every year up to the following first day of May inclusive." There was no mention in the agreement of the period for which it was to run, and neither party was in terms given power to determine it. On April 30, 1927, the Crediton U. D. C. served notice on the gas company to determine the lighting agreement:—

Held, that an agreement, which, although indefinite in point of time, was merely one by which a gas company obtained a customer for its gas on particular terms, from its very nature introduced an implication that either party could determine it by notice.

WITNESS ACTION.

In 1843 the Crediton Gas and Coke Company was formed to supply the parish and neighbourhood of Crediton with gas. In October, 1905, the Crediton Gas Company, Ld., was registered under the Companies Acts to acquire and carry on the business of the Crediton Gas and Coke Company. By the Crediton Gas Act, 1906 (6 Edw. 7, c. clxiv.), the

limited company was dissolved, and its members were united into a company incorporated by the name of the Crediton Gas Company as a body corporate with perpetual succession and a common seal. By an agreement under seal of March 30, 1909, between the Crediton Gas Company and the Crediton U. D. C. the company agreed to light all public lamps "from and after the first day of September in every year up to the following first day of May inclusive" at certain rates, which were varied by a supplemental agreement dated June 30, 1921. The 1909 agreement in terms entitled neither party to determine it. On April 30, 1927, the council served a notice on the gas company "to determine their agreement with you for the public lighting of their district on August 31, 1927." The gas company contended the council was not entitled to determine the agreement without their consent, and asked for a declaration that the notice was of no effect and inoperative.

Bennett K.C. and *D. D. Robertson* for the plaintiffs. This is an agreement to light all the public lamps "in every year," and it was therefore intended to be permanent. Prima facie every contract is permanent and the person alleging the contrary must show some expression in the contract, or in its nature, which raises an implication that it was not intended to be permanent: *Llanelly Ry. and Dock Co.* v. *London and North Western Ry. Co.* (1) This agreement gives no power to either party to determine it, and there is nothing in the subject-matter from which the law will imply a power to either party to end it at will.

Spens K.C. and *H. S. G. Buckmaster* for the defendants. This agreement is of such a nature that it is reasonably to be implied that it was not intended to be permanent. It was made at a time when the company or its predecessors had for more than sixty years supplied Crediton with gas. It is an ordinary commercial agreement by which the company secures a customer for its gas. The remarks of James L.J. and Lord Selborne in the *Llanelly* case (1) were not intended

(1) (1873) L. R. 8 Ch. 942, 949; (1875) L. R. 7 H. L. 550, 567.

RUSSELL J.
1927
CREDITON GAS CO. v. CREDITON URBAN COUNCIL.

to apply to such a case. The *Llanelly* agreement gave running powers to a railway company and, as James L.J. pointed out, running powers determinable at will or short notice would be a delusion. For running powers to be an effectual substitute for the independent line which the person seeking the powers would otherwise attempt to make they must be perpetual. In the case of *In re Lindrea* (1) Sargant J. refused to hold on the authority of the *Llanelly* case that "I agree to give 150*l.* a year" was an agreement to give that sum for ever. This agreement, because of its nature, must be determinable by either side on reasonable notice, and such notice has been given by the defendants.

RUSSELL J. The agreement of March 30, 1909, in terms confers no power on the council to determine it, but it is said by the defendants that the nature of the agreement is such that either party by implication was entitled to determine it by reasonable notice. The plaintiffs say that the agreement is perpetual. For that statement they rely on the case of *Llanelly Ry. and Dock Co.* v. *London and North Western Ry. Co.* (2) In that case the agreement gave running powers to the defendants over the plaintiffs' line without mentioning any limit of time, or any mode of terminating the power, and it was held that the circumstances under which the agreement was made, and its particular terms, supported the conclusion that it was to have unlimited duration. In the course of his judgment James L.J. said (3): "I start with this proposition, that prima facie every contract is permanent and irrevocable, and that it lies upon a person who says that it is revocable or determinable to show either some expression in the contract itself, or something in the nature of the contract, from which it is reasonably to be implied that it was not intended to be permanent and perpetual, but was in some way or other subject to determination. No doubt there are a great many contracts of that kind: a contract of partnership, a contract of master and servant, a contract of principal and agent, a contract of employer and employed in various modes—all

(1) (1913) 109 L. T. 623. (2) L. R. 8 Ch. 942; L. R. 7 H. L. 550.
(3) L. R. 8 Ch. 942, 949.

these are instances of contracts in which, from the nature of the case, we are obliged to consider that they were intended to be determinable. All the contracts, however, in which this has been held are, as far as I know, contracts which involve more or less of trust and confidence, more or less of delegation of authority, more or less of the necessity of being mutually satisfied with each other's conduct, more or less of personal relations between the parties." On these grounds James L.J. held that the agreement was irrevocable. That decision was upheld in the House of Lords, where Lord Selborne said (1): "My Lords, an agreement de futuro, extending over a tract of time which, on the face of the instrument, is indefinite and unlimited, must (in general) throw upon any one alleging that it is not perpetual, the burden of proving that allegation, either from the nature of the subject, or from some rule of law applicable thereto. So far as the words go, there is here no limit; and if any limit, or the power of fixing a limit, is to be implied, it can only be on one or other of these two ways. In the present case, the character of perpetuity attaches both to the legal personality of each of the contracting parties, and to the legal character and use of the subject-matter, the railway; and the objects of the agreement are favourably regarded by the law; all such companies having express statutory powers to contract (without any necessary limit of time) for such objects, and being (in the absence of contract) to some extent always under legal obligations, actual or potential, of a like general character. All these considerations, so far from introducing any implication from the nature of the subject-matter, or from any rule of law, against the natural import of the unlimited terms (as to time) in which this particular agreement is expressed, tend to confirm the prima facie conclusion that an agreement expressed in such indefinite terms is to have unlimited duration. The whole circumstances under which this agreement was made, and its particular terms, support the same conclusion."

Those two passages were relied upon by the plaintiffs. In this case, do the circumstances under which the agreement

(1) L. R. 7 H.L. 550, 567.

RUSSELL J. 1927 CREDITON GAS CO. v. CREDITON URBAN COUNCIL.

was made and its particular terms support the conclusion that it was intended to be permanent? In 1909, when the agreement was made, the public lighting of Crediton was established, and there were no service expenses in carrying out the contract. The contract was a commercial contract. The gas company was merely getting a customer for its gas. The remarks of James L.J. and of Lord Selborne do not point to that class of contract being perpetual. It is true that the character of perpetuity attaches to the legal personality of each of the contracting parties, one being a statutory company and the other a public authority; but it is impossible in these days when limited liability is the general rule to say that for that reason a contract, indefinite in point of time, by which a gas company secured a customer on particular terms, was intended to be permanent.

I am of opinion that the nature of the contract involves an implication that either party can terminate it by notice. It is possible that a notice to be effective must expire with the lighting year, but the notice given complies with that condition. The action is dismissed with costs.

Solicitors: *R. W. Cooper & Sons; Guscotte, Wadham, Tickell & Co., for John Symes, Crediton.*

J. B. B. M.

ROYAL EXCHANGE ASSURANCE *v.* HOPE.

[1927. R. 229.]

C. A.
1927
TOMLIN J.
June 30.
C. A.
Oct. 18;
Nov. 28, 29;
Dec. 9.

Insurance (Life)—Assignment of Policy—Subsequent Extension of Period of Insurance by Assured—Extension effected by Indorsement on original Policy—Death of Assured during extended Period—Right of Assignee to Policy Money—Trust—Variation of original Contract of Insurance—No new Contract.

By an insurance policy dated August 13, 1925, an assurance company agreed to pay the assured his executors, administrators or assigns the sum of 1000*l.* in the event of his death on or before July 31, 1926. The assured assigned the benefit of the policy to the defendant. In July, 1926, the assured arranged for an extension of the period of insurance to October 31, 1926, and this extension was given effect to by indorsing on the policy a declaration "that the sum assured shall be payable in the event of the death of the life assured on or before October 31, 1926." No assignment was ever made of the benefit of this extension. The assured died on October 1, 1926:—

Held, by the Court of Appeal, that the extension of the period of the policy by indorsement was not a new contract of insurance but a variation of the original contract of which the benefit was vested in the defendant, and that she was entitled to recover the policy money by virtue of the assignment to her of the policy.

Held, also (affirming the decision of Tomlin J.), that the effect of the transaction was that the assured entered into the contract for the extension of the policy for the benefit of the defendant and as trustee for her, and that the defendant was therefore, also, on that ground, entitled to the policy money.

ACTION.

By a contract of life assurance dated August 13, 1925, and evidenced by a policy No. 276732, the Sun Life Assurance Society agreed in consideration of a single premium of 22*l.* to pay Samuel Barker his executors, administrators or assigns the sum of 1000*l.* in the event of his death on or before July 31, 1926. By deed dated August 27, 1925, Samuel Barker voluntarily assigned "All that policy of assurance on the life of the assignor effected in the Sun Life Assurance Society in the name of the assignor and numbered 276732 for the sum of 1000*l.* and the sum of 1000*l.* assured thereby and the full benefit thereof" to the defendant absolutely. Written notice of the assignment dated September 2, 1925, was given to the Society. It was admitted that the beneficial

C. A. 1927 ROYAL EXCHANGE ASSURANCE v. HOPE.

interest in the policy passed to the defendant and that there was no resulting trust.

Shortly before the expiration of the period of the above policy Samuel Barker, being then abroad, arranged for his life being similarly insured for a further period of three months. This extension was given effect to by stamping on the schedule to the policy where the amount payable and the period of insurance were stated, the words "altered by indorsement" and by indorsing on the back of the policy: "In consideration of the sum of 6*l.* 2*s.* 6*d.*, a separate receipt for which has been issued, having been received by the Society, it is hereby declared that the sum assured shall be payable in the event of the death of the life assured on or before the 31st October, 1926, instead of as set out in the schedule." The benefit of this indorsed extension was not assigned to the defendant.

Samuel Barker died on October 1, 1926, and the plaintiffs were his executors.

The defendant having made a claim to the policy money, the Society refused to pay the same to the plaintiffs until the defendant's claim was withdrawn or disposed of.

The plaintiffs therefore brought this action for a declaration that they were entitled to the whole right title and interest in and to the sum of 1000*l.* payable by the Society under the contract of life assurance evidenced by the policy No. 276732 and the indorsement thereon.

The action was heard before Tomlin J. on June 30, 1927.

Macgillivray for the plaintiffs. The defendant was not an assignee of the extension of the period of the policy, for the assignment was not in terms that would carry an interest not in existence at the date of the assignment. No legal assignment of an interest not in existence is possible. It is possible to have an agreement to assign such an interest if made for valuable consideration, but here there was no consideration, and such an agreement, if voluntary, would be unenforceable, because the Court will not enforce an imperfect assignment in aid of a volunteer. It is like an

attempted assignment of an expectancy, which in favour of a volunteer is void even if made under seal: *In re Ellenborough.* (1)

[TOMLIN J. It may be that no alteration of the policy was possible except for the benefit of the assignee.]

There was no alteration here, but an extension. The fact that the policy for the new period was effected by an indorsement makes no difference. The position is the same as if a new policy had been issued. Further, there is nothing here to show that the testator constituted himself a trustee of the extended policy for the defendant. Clearly the only way in which the testator showed an intention to benefit the defendant was by assignment. The existence of an assignment negatives an intention to create a trust: *Milroy* v. *Lord.* (2) There is nothing to show that the testator ever intended to make the gift in any other form, as by holding the policy as trustee for her. The only way in which he could have made the extension of the policy for the benefit of the assignee is if he had acted as her agent; but nothing of the kind occurred. Even if the true view is that the testator sought to extend the policy for the benefit of the assignee, that will not suffice to make him a trustee for her: *Cleaver* v. *Mutual Reserve Fund Life Association* (3); *In re Burgess' Policy* (4); *In re Engelbach's Estate.* (5)

Henry Johnston for the defendant. The defendant being entitled under the original policy to the knowledge of the Society, the Society voluntarily altered that policy. This alteration must enure for the defendant's benefit. The extension of the policy must be construed as a contract to pay the defendant's 1000*l.* in the circumstances specified.

[TOMLIN J. Apart from cases under the Married Women's Property Act the defendant, being a stranger to the second contract, could not sue on it: *Cleaver* v. *Mutual Reserve Fund Life Association.* (3)]

That view of the law was mere dictum, as that was a case under the Married Women's Property Act, and it does not

(1) [1903] 1 Ch. 697.
(2) (1862) 4 D. F. & J. 264.
(3) [1892] 1 Q. B. 147, 151, 157.
(4) (1915) 113 L. T. 443.
(5) [1924] 2 Ch. 348.

C. A. 1927 ROYAL EXCHANGE ASSURANCE v. HOPE.

accord with *Gandy* v. *Gandy* (1), which was never cited there. By extending the policy of which the defendant was an assignee Barker must be taken to have entered into the contract of insurance for the benefit of the defendant and so to have made himself a trustee for the defendant: *Tomlinson* v. *Gill* (2); *Gregory* v. *Williams* (3); *Lloyd's* v. *Harper* (4); *Fletcher* v. *Fletcher* (5); *Les Affréteurs Réunis Société Anonyme* v. *Leopold Walford* (*London*), *Ld.* (6), and these authorities show that where this is so, the cestui que trust can sue.

Macgillivray in reply. The whole of the argument for the defendant turns on the view that the second contract was a contract to pay the person entitled to the benefit of the first contract. There is no real ground for this. If that had been the intention the indorsement on the policy would have provided for payment to the defendant, whereas it follows the first policy in providing for payment to Samuel Barker, his executors administrators or assigns. "Assigns" in the second contract cannot mean the defendant merely because she was an assign of the first contract. But even if intended to enure for the defendant's benefit, no declaration of trust can be obtained out of it. The truth is that there is nothing from which a trust can be inferred; and the cases relating to the position of a cestui que trust which have been cited, really have no bearing. Again *Lloyd's* v. *Harper* (7) and *Les Affréteurs Réunis Société Anonyme* v. *Leopold Walford* (*London*), *Ld.* (6), are really cases of principal and agent.

TOMLIN J. This is an action in which the executors of one Samuel Barker seek against the defendant, Mrs. Hope, "a declaration that the plaintiffs are entitled to the whole right, title and interest in and to the sum of 1000*l.* payable by the Sun Life Assurance Society under the contract of life assurance evidenced by the policy No. 276732 granted by the said Society to Samuel Barker and by the endorsement

(1) (1885) 30 Ch. D. 57.
(2) (1756) Amb. 330.
(3) (1817) 3 Mer. 582.
(4) (1880) 16 Ch. D. 290, 316.
(5) (1844) 4 Hare, 67.
(6) [1919] A. C. 801.
(7) 16 Ch. D. 290.

thereon dated the 13th August, 1926." It will be observed that the declaration asked for is a declaration not that they are entitled to the money payable under the policy, but that they are entitled under the contract of life assurance evidenced by the policy, and by the indorsement. It is a declaration which is very carefully framed, having regard to the special circumstances of this case. [His Lordship then stated the facts.] It is said on behalf of the executors of Mr. Barker that the true position is that there was, first of all, the contract of August 13, 1925, which was assigned by the assignment of August 27, 1925, and, secondly, a wholly independent second contract under which Mr. Barker's life was insured for three months from July 31, 1926, till October 31, 1926; and it is contended, first, that as the second contract was later in date than the assignment, that assignment could not, whatever the language of the assignment and however wide its terms, operate at law to pass the benefit of that future contract, and, secondly, that the assignment was not, in fact, wide enough to carry more than the original contract, and, thirdly, that if it was wide enough to carry more than the original contract, it could at most operate as an agreement to assign, which equity would not enforce in favour of a volunteer. It is said further by the plaintiffs that there is nothing in the circumstances of the case which will either prevent the two contracts being treated as two independent contracts, or give the defendant any interest, either directly or indirectly, that is to say, either as a contractor in the second contract, or as a person entitled as beneficiary to the benefit of some trust affecting the second contract. On the other hand, it is said on behalf of the defendant that the circumstances of the case are such that only one conclusion is possible—namely, that the alteration of the first contract was made in such circumstances that the benefit of the second contract whereby the alteration was made, is a benefit to which the defendant is entitled.

It is material to consider the circumstances in which the second contract was made. The second contract was entered into in July, 1926, at a time when both Mr. Barker, the

C. A. 1927 — ROYAL EXCHANGE ASSURANCE v. HOPE. — Tomlin J.

assured, and the insurance company were aware that the original policy had been assigned to the defendant. If Mr. Barker had intended to cover his life for his own benefit for a period beyond July 31, 1926, it would be not unnatural to expect that he and the insurance company, with the knowledge they possessed, would have entered into that contract in the form of a fresh independent policy. That would seem the natural course to take when an assured is extending the cover on his life beyond the period already covered after assigning the existing policy to somebody else; but instead of doing this they altered the existing policy.

Therefore the first question I have to consider is what is the construction of that second contract? The construction of that second contract is not in my view in doubt. It is a bargain between the assured and the insurance company that the policy shall be read as though the period during which it was effective and the event upon which the money was payable, should be the death of the life assured on or before October 31, 1926. The indorsement says: "It is hereby declared that the sum assured," that means the sum assured by the existing policy, "shall be payable in the event of the death of the life assured on or before the 31st October, 1926, instead of as set out in the schedule." The original contract is to be extended and read as though it were a contract for payment of the sum assured on the death of the life assured on or before October 31, 1926. Therefore the second contract simply provides that in consideration of a premium the original policy shall be read in a way which has the effect of extending the period to October 31, 1926.

The money is payable under the policy to the assured, his executors, administrators or assigns. The company and the assured, Mr. Barker, are fully aware that the policy has been assigned. What then is the proper inference to draw from the circumstance that Mr. Barker, knowing that he has assigned the policy to the defendant, contracts with the insurance company, who also know of the assignment, that the period of the policy shall be extended? I think myself that the proper inference to draw is that Mr. Barker entered

into that contract with the insurance company, extending the period covered by the policy, in order that the assignee of the policy might have the benefit of the extension, and that he entered into the contract as a trustee for her. I have had on both sides an interesting argument, in the course of which my attention has been called to a number of cases, both ancient and modern. I do not think myself that the principles in regard to matters of this kind are really much in doubt. I think it plain that a third party, who is named in a contract as somebody to whom payment is to be made, is prima facie not entitled to sue under the contract, or to make any claim, directly or indirectly, in respect of it. On the other hand, it may be that by reason of the construction of the contract, or the special circumstances in which the contract is entered into, the true effect of the contract is that one of the contracting parties is contracting as trustee for the third party; and where this is so, such cases as *Tomlinson* v. *Gill* (1), *Gregory* v. *Williams* (2), *Lloyd's* v. *Harper* (3) make it plain that if the trustee sues, he is entitled to sue and recover on the footing that he is a trustee for the beneficiary, but that if the trustee refuses to sue, the beneficiary is entitled to sue in his own name in the presence of the trustee, whom he may make a defendant; that is the recognized practice in this Court. The case of *Cleaver* v. *Mutual Reserve Fund Life Association* (4), and the more recent cases of *In re Burgess' Policy* (5), and *In re Engelbach's Estate* (6) seem to me to be not inconsistent in any way with that principle. I am not sure that the question really arose in *Cleaver's* case (4), but in the two later cases a third party was named in the contract and the Court came to the conclusion that on the construction of the contract, and in the circumstances in which the contract was entered into, there was nothing in the nature of a trust, and that the third party was not a beneficiary under any trust so as to be entitled to relief.

(1) Amb. 330.
(2) 3 Mer. 582.
(3) 16 Ch. D. 290.
(4) [1892] 1 Q. B. 147.
(5) 113 L. T. 443.
(6) [1924] 2 Ch. 348.

C. A.
1927
ROYAL EXCHANGE ASSURANCE v. HOPE.
Tomlin J.

My own conclusion in this case is that I have here circumstances from which the proper inference to draw is that the second contract is a contract for extending the time of the original policy entered into on behalf of and for the benefit of the defendant, so as to give her the right as assign of the policy, either to recover the policy money if the trustee refuses to do so in his presence, or possibly to recover it directly herself; but in any case, I hold that as between the defendant and the estate of Samuel Barker, she is entitled to the money.

I propose, therefore, to make a declaration that the money payable under this policy, as modified by the indorsement, belongs to the defendant, and to give the defendant the costs of the action.

H. C. G.

C. A.

The plaintiffs appealed. The appeal was heard on October 18, November 28 and 29, 1927.

S. L. Porter K.C. and *Macgillivray* for the appellants. The assignment to the respondent was not wide enough in its terms to carry the original policy, as extended by the subsequent indorsement. All that was in existence at the date of the assignment was a policy expiring on July 31, 1926. There was nothing on the face of the policy to suggest a renewal. It was for a fixed period at a single premium.

[LORD HANWORTH M.R. referred to *Kensington* v. *Inglis* (1) and *Hill* v. *Patten*. (2)]

The extension of the policy was a fresh contract. The subject-matter of the two contracts, the life of the assured, was the same, but the periods of time for which the insurance was effected were different. The second contract was not in existence at the time of the assignment to the respondent of the first contract and therefore could not be assigned. At the highest the assignment can only be put as an agreement to assign, and equity will not enforce such an agreement in favour of a volunteer.

(1) (1807) 8 East, 273. (2) (1807) 8 East, 373.

It is suggested on behalf of the respondent that what Barker did he did as agent for the respondent, but the respondent herself could not have extended the policy, as she had not an insurable interest in the life of the assured, and therefore Barker could not have done so as her agent. Further Barker could not have varied the contract on his own behalf, as he had already assigned the benefit of it to the respondent.

[SARGANT L.J. I do not see why a stranger should not do something which would improve the value of the chose in action in the hands of the assignee.]

Assuming that the respondent had no insurable interest in the life assured, she could not have varied the contract by increasing the benefit under it, as for instance by increasing the amount of the insurance from 1000*l.* to 5000*l.* The question here is not whether the respondent had an interest in the policy, but whether she had an interest in the life. She had the former, no doubt, under the assignment, but it is not correct to say she had an interest in the life.

It is purely fallacious to say that in extending the period of the policy Barker was acting as the agent of the respondent.

But assuming that it was competent to the parties to vary the original contract then, it is submitted, that what was in fact done was not to vary the original contract but to create a new one. The case falls within *Hill* v. *Patten* (1) rather than within *Kensington* v. *Inglis*. (2) The second contract is an entirely different instrument. The assured was then older; he was abroad, and the rate of insurance was different.

There is no reported case in which an assignment has been held to carry anything but the chose in action as it existed at the date of the assignment.

It is submitted therefore that the appellants are entitled to recover the policy money from the insurance office and to retain it for the benefit of the assured's estate.

Archer K.C. and *Henry Johnston* for the respondent. On the question whether the extension of the period constituted a new contract the observations of Lord Sumner in *British*

(1) 8 East, 373. (2) 8 East, 273.

C. A. 1927 ROYAL EXCHANGE ASSURANCE v. HOPE.

and Beningtons, Ld. v. *N. W. Cachar Tea Co.* (1) are in point. The question is one of fact and regard must be had to all the circumstances of the case. Here, it is submitted, the contract was one and the same throughout; but if that is not so and there was a second contract, the evidence is irresistible that it was made by Barker for the benefit of the respondent and that he was trustee of it for her: *Tomlinson* v. *Gill.* (2) That case was referred to and approved by Cotton L.J. in *Lloyd's* v. *Harper.* (3) Here if the appellants had sued an insurance company and recovered the insurance money they would, as trustees, have been bound to hand it over to the respondent. The present case is distinguishable from *In re Engelbach's Estate* (4) on the facts, and falls within the principle laid down by Bowen L.J. in *Gandy* v. *Gandy.* (5)

S. L. Porter K.C. in reply. It is submitted that no trust was created of the second contract. To constitute a trust there must be something to show that the person alleged to be the trustee was endeavouring to carry out a trust and not merely to carry out a gift by some other means. He must have done something equivalent to declaring himself a trustee. There must be some expression by him of an intention to become a trustee: *Richards* v. *Delbridge.* (6) It must be seen whether the words used or the acts done amount to a valid declaration of trust. As to *Lloyd's* v. *Harper* (7) Lloyd's are always trustees for those for whose benefit contracts are entered into, and in that case they were trustees before the contract was made. So too in *Tomlinson* v. *Gill* (2) the widow was already a trustee as administratrix.

[LORD HANWORTH M.R. She held no position at all. She was applying to administer the estate.]

Gandy v. *Gandy* (8), so far as it is a decision, is in the appellants' favour. There there were actual trustees, and there was no question as to whether the creation of a trust was to be inferred.

(1) [1923] A. C. 48, 68, 69.
(2) Amb. 330.
(3) 16 Ch. D. 290, 317.
(4) [1924] 3 Ch. 348.
(5) 30 Ch. D. 57, 69.
(6) (1874) L. R. 18 Eq. 11.
(7) 16 Ch. D. 290.
(8) 30 Ch. D. 57.

The position here is very like that of a third person interfering in any contract.

In *In re Engelbach's Estate* (1) the policy was stated to be for the benefit of the insurer's daughter, but she was not a party to it, and it was held that no trust was created in her favour.

In the present case there is no ground for the suggestion that when Barker altered the policy he did so as trustee for the respondent. He intended to assign it to her, and having failed to do so the Court will not hold him to be a trustee of it for her.

In *Kensington* v. *Inglis* (2) the sole question was whether the subject-matter had been altered, and it was held that it had not, but that the dates had.

Cur. adv. vult.

Dec. 9. The following written judgments were delivered :—

LORD HANWORTH M.R. By a policy dated August 13, 1925, Samuel Barker effected an insurance upon his life for the term of one year from July 31, 1925, with the Sun Life Assurance Society. He paid a single premium of 22*l.* The policy, which was numbered "276732" and stamped, expressed the terms and conditions on which it was granted. It was world-wide and free from all restrictions as to foreign residence, travel, and occupation and contained a term that notice of any assignment must be registered at the chief office of the Society. On August 27, 1925, by an indenture of that date Samuel Barker assigned that policy No. 276732 to the defendant absolutely ; and notice of this assignment was given to and received by the Society on September 3. In June and July, 1926, Barker was in California, and at the end of that month his solicitors cabled out to him the terms on which the Sun Life Assurance Society would grant "an extension short time policy not exceeding three months," on condition that his health was good and that he had not suffered any illness since the policy was effected—at a premium of 6*l.* 2*s.* 6*d.* On July 29 Mr. Barker cabled accepting the Sun's offer and stating that his condition and health since

(1) [1924] 2 Ch. 348. (2) 8 East, 273.

C. A. 1927 — ROYAL EXCHANGE ASSURANCE v. HOPE. — Lord Hanworth M.R.

July 31, 1925, fulfilled the required conditions. Accordingly on July 30 the stipulated premium was paid, and the following receipt given, signed by the secretary. "Policy No. 276732. Extension of policy for 3 months, till 31/10/26. 6*l.* 2*s.* 6*d.* Received this 30th day of July 1926 additional premium as stated above. The delivery of the policy may be expected at the expiration of about 14 days from the date of this receipt." The policy was returned and bore an indorsement dated August 13, 1926, as follows: "Endorsement . . . . in consideration of the sum of 6*l.* 2*s.* 6*d.* (a separate receipt for which has been issued) having been received by the Society. It is hereby declared that the sum assured shall be payable in the event of the death of the life assured on or before the 31st October 1926 instead of as set out in the schedule." The schedule on the face of the policy which described "the event in which the sum assured is payable" as "the death of the life assured on or before the 31st July 1926" had the words added, "altered by endorsement." No fresh stamp was paid. The original policy stood, but one of its terms, the time limit, was extended, just as in a policy which contained a restriction on foreign residence or travel, that term might have been withdrawn so as to make the assurance world wide on the payment of an extra premium.

Mr. Barker died on October 1, 1926. The Society are ready to pay the 1000*l.*; and this action has been brought by his executors for a declaration that they are entitled to receive the sum assured as falling in to his estate. The executors claim that the contract of insurance that was operative at the time of their testator's death was not the original one whereby Mr. Barker's life was insured between July 31, 1925, and July 31, 1926, which was assigned to the defendant; but a new and separate contract altogether—a contract insuring the life from August 1 to October 31, 1926, at a separate premium of 6*l.* 2*s.* 6*d.*, and that that policy did not pass to the defendant under the assignment.

Tomlin J. held that the defendant was entitled to succeed; that the testator entered into the contract for the extended period as trustee for the defendant. He made a declaration

C. A. 1927

ROYAL EXCHANGE ASSURANCE v. HOPE.

Lord Hanworth M.R.

that the defendant is entitled to the moneys payable under the policy and gave judgment for her with costs. From that judgment the executors appeal.

It is, in my opinion, impossible to hold that the insurance for the later three months was a new and separate contract. The terms offered and accepted were for a short extension of the contract of insurance which was then in being and unexpired. No suggestion was made for a new and independent policy. There was no fresh stamp, as there must have been if a new policy had been effected. There was no new number assigned to the fresh contract; but the old policy was indorsed with a new time limit for the risk, and the old limit was "altered." This alteration is subsidiary to the main purpose of the contract as it stood originally—the subject-matter of the risk was not changed. The observations made by Lord Sumner in *British and Beningtons, Ld.* v. *N. W. Cachar Tea Co.* (1) appear to me in point. The variation may be in strict logic a new contract, but the discharge of an old contract is a matter of intention. So far as it was possible to indicate it, the insured and the Society appear to me to have expressed an intention to maintain the old contract, to continue and to extend it.

There was no new policy issued and the requirements of the Stamp Act were not complied with. In *Morris* v. *Baron & Co.*(2) the question of the rescission of an old contract upon the making of a new one was considered, and it was held that where there is a clear intention to rescind, as distinguished from an intention to vary, the old contract will be rescinded. In the present case there was the clearest intention to maintain the contract and to vary one term of it only. The distinction between an extension of the time of insurance upon the old subject of insurance, and an extension which makes the policy cover a different risk from that originally embraced, is well pointed out by Lord Ellenborough in *Kensington* v. *Inglis* (3), where the quantum of the risk was not altered, but the dates of sailings extended, leaving "the insurance on the same thing, if the underwriters should agree by a

(1) [1923] A. C. 48, 68, 69. (2) [1918] A. C. 1.
(3) 8 East, 273, 293.

C. A. 1927 ROYAL EXCHANGE ASSURANCE v. HOPE. Lord Hanworth M.R.

memorandum to continue insurers on it." It was thus held that a fresh stamp was not required, because an alteration of the dates of sailing did not alter the nature of the risk and was merely "a lawful alteration in the terms or conditions of the policy," and so within the exception of s. 13 of the statute 35 Geo. 3, c. 63, which excuses the necessity of a fresh stamp in such cases.

There remains the point taken for the plaintiffs that at the time when the extension was made all interest in the policy had passed to the defendant by the assignment, so that the deceased had no rights or power in relation to it; and that the defendant had no insurable interest in the deceased's life, so that he could not act as her agent.

In my judgment, however, the deceased could enlarge or improve the policy, and if the enlargement or improvement was agreed to and accepted by the Sun Life Assurance Society, it enured to the benefit of the defendant. If during the original term, policy No. 276732 had been increased to an amount of 1500*l.* by the payment of an additional premium accepted by the insurers, I think the extra 500*l.* would have been receivable by the defendant, just as if the assignment had been of numbered shares in a company which had been increased in value. The money payable by the Sun Life Assurance Society is payable under policy No. 276732, and that policy was identified in the assignment. This view makes it unnecessary to consider the point upon which Tomlin J. based his judgment—namely, that Mr. Barker, when he effected the extension, acted as trustee for the defendant. I agree that that principle can be adopted, if necessary, in the present case. That is to say, that the deceased by a new contract effected an enlargement of the time limit acting as trustee for the defendant; and the money received, even if it is treated as received under a separate contract, is to be treated as received under a contract made by a trustee for the defendant who can enforce her rights as a beneficiary under it, on the same principle as in *Lloyd's* v. *Harper*. (1)

The appeal must be dismissed with costs.

(1) 16 Ch. D. 290.

SARGANT L.J. I agree that the decision of Tomlin J. should be affirmed.

The appellants' position, as stated in their pleading and as presented in their argument, is that there were here two distinct and separate contracts between the deceased, Mr. Samuel Barker, and the Sun Life Assurance Society, the first being that of August 13, 1925, for an insurance for a period of one year, that is, from July 31, 1925, over July 31, 1926, and the second being that of August 13, 1926, for an insurance for a further period of three months—namely, from July 31, 1926, over October 31, following. And this being so, and there having been no actual assignment by the deceased to the respondent, Mrs. Hope, of the benefit of the second contract, nor any declaration of trust by him in her favour of that contract, the appellants urge that the benefit of the second three months' contract remained the property of Mr. Barker, and forms part of the estate to which they are entitled as his executors. They do not dispute in any way the general intention of Mr. Barker that Mrs. Hope should have the benefit of the second contract, but they argue that Mr. Barker's acts did not amount at most to more than an incomplete attempt to assign or to declare a trust, and that this is not sufficient in the case of a voluntary donee, or volunteer, such as Mrs. Hope. On this point they cite and rely on the clear exposition of the equitable doctrines on the subject to be found in the judgment of Sir George Jessel in *Richards* v. *Delbridge*. (1)

At first sight this argument is attractive from a mere legal point of view, however repugnant to an ordinary common-sense view of the transaction. But on closer examination I think it defective even from a legal standpoint in paying too little attention, first, to the situation occupied by the persons concerned at the date of the second transaction and, secondly, to the precise terms of the bargain effected between the deceased and the Sun Office. At the date of the second transaction the whole benefit of and interest in the policy had been assigned by the deceased to Mrs. Hope to the

(1) L. R. 18 Eq. 11.

C. A. 1927 ROYAL EXCHANGE ASSURANCE v. HOPE. Sargant L.J.

knowledge of the Sun Office ; and he and they were bargaining with regard to a chose in action which belonged absolutely to her. And, further, the second transaction, as evidenced both by the terms of the written documents, which made the bargain, and by those of the indorsed memorandum which carried it out, were not that a new contract of insurance should be effected, but that Mrs. Hope's existing contract should be varied and extended so as to be rendered more valuable by the substitution of October 31, 1926, for July 31, 1926, as the termination of the period protected by the insurance. I see no reason why a payment actually made to and accepted by the Sun Office for the purpose of improving a policy of theirs in the hands of the holder and owner should not have that effect, although the payment comes from a third party.

Let me take one or two examples by way of analogy. A. has a current account with a bank B., and C., an outsider, makes an actual voluntary payment to the bank to the credit of the current account : or A. holds shares in company B. on which calls are due and C., an outsider, voluntarily pays those calls to the company : or again, to get a little closer, A. holds a policy of insurance on his own life with an insurance company B. on which annual payments have to be made, and C. to benefit A. pays a lump sum to the company B. to render the policy free from annual payments in the future. In all these cases it seems reasonably clear that A. takes the benefit of the actual voluntary payment, and holds his balance or his shares or his policy improved by the actual payment without there being any claim by C. thereon by way of equitable lien or otherwise : *In re Leslie.* (1) It is, of course, true that in any such case C. cannot make any bargain with B. to alter the general rights of A. as against B. But an actual completed payment, however voluntary, which has the mere effect of benefiting the property or chose in action of A. stands on a totally different footing. *Milroy* v. *Lord* (2), *Richards* v. *Delbridge* (3), and other cases of that

(1) (1883) 23 Ch. D. 552. (2) 4 D. F. & J. 264.
(3) L. R. 18 Eq. 11.

kind are examples of attempts to make voluntary transfers of property which were insufficient as actual transfers and did not amount to declarations of trust. They do not, in my judgment, touch a case like this, where there is an actual completed payment by way of addition to or improvement of a fund, chose in action or other property which already belongs to the volunteer intended to be benefited.

Had the policy here run out at the time when the payment by Mr. Barker was agreed to and made, Mrs. Hope's position would be a more difficult one. In that case a completely new contract of insurance might have been necessary. But it is clear that both the agreement and the payment were effected while the policy had still a day or two to run; and in my judgment they amounted to a variation for the benefit of the assured of the existing policy, a variation which was subsequently formally expressed in the memorandum indorsed on the policy. As to this the decision in *Kensington* v. *Inglis* (1) is of much assistance to the respondent.

In the view I have taken it is unnecessary to consider whether the respondent can succeed on the ground relied on by Tomlin J.—namely, that Mr. Barker in effecting the second transaction was constituting himself a trustee for the respondent of the benefit of the contract to extend the policy. But I must not be taken as dissenting from that conclusion. In view of the absolute ownership by Mrs. Hope of the existing policy it is difficult to see how in contracting for its extension Mr. Barker can have been acting for himself or on behalf of any one other than Mrs. Hope. He could not himself acquire an interest in the policy since he was at the time a mere outsider: *In re Leslie.* (2)

LAWRENCE L.J. The main contention of the appellants on this appeal was that the assignment of August 27, 1925, only operated to assign the policy as it then existed and did not pass any future extensions of the policy. The appellants also contended that even if the terms of the assignment were held to be wide enough to cover future extensions, the

(1) 8 East, 273. (2) 23 Ch. D. 552.

C. A. 1927 ROYAL EXCHANGE ASSURANCE v. HOPE. Lawrence L.J.

assignment would as regards such extensions at most operate as an agreement to assign and, being voluntary, could not be enforced.

In my opinion these contentions are based on a misconception of the real nature of the transaction as carried out by the parties. The method adopted by the assured for effectuating his admitted intention to benefit the respondent by extending the policy in her favour, was to make an agreement with the Assurance Society that in consideration of a money payment the Assurance Society should alter one of the terms of the existing policy, which then belonged absolutely to the respondent, and incorporate such alteration in that policy as if the policy had originally been issued as so altered, thus improving the policy in the hands of the respondent. In pursuance of this agreement and in consideration of the payment by the assured of 6*l.* 2*s.* 6*d.* the Assurance Society duly effected the necessary alteration in the policy and thereby made itself liable on the face of the policy to pay to the respondent the sum of 1000*l.* in the event of the death of the assured on or before October 31, 1926, instead of the date originally inserted in the policy. Had the Assurance Society after receiving payment of the consideration failed to carry out their bargain to alter the policy in the manner agreed upon, or had the Assurance Society declined to honour their obligation under the policy as altered, the assured or his executors might have had a claim against the Assurance Society for damages for breach of the agreement to effect or carry out the alteration, but such a breach would have created no right in the executors to recover the policy moneys for the benefit of the estate of the assured.

The fallacy underlying the contention of the appellants consists in treating the transaction as if the assured had effected a fresh policy on his life for a further period of three months and had omitted to assign such fresh policy to the respondent, thus compelling the respondent to rely on the original assignment as impliedly transferring the beneficial interest in the fresh policy to her. If the transaction had taken this form the appellants' contention would, in my

opinion, have been well founded and then the respondent could only have succeeded on the footing that in taking out this fresh policy the assured had acted as a trustee for her. In view, however, of the form which the transaction actually took this question does not in my opinion arise. The whole transaction was complete when the Assurance Society made the alteration in the policy and assumed liability to the respondent under the altered policy. There was then nothing further for the assured to do in order to vest the benefit of the extension in the respondent and no assignment by him was required. Mr. Porter indeed suggested that whatever might be the method by which the transaction was carried out it could only be effectual in law on the footing that the assured had taken out a fresh policy on his life, and that in order that the benefit of such new policy should have become vested in the respondent it was essential that it should have been assigned by him to the respondent, because the respondent had no insurable interest in the life of the assured and, therefore, the assured could not be treated as having effected the alteration merely as her agent. In my judgment this suggestion has no substance in it. The assured was fully competent to agree with the Assurance Society that the policy on his life should be improved in the hands of his assignee by substituting a later date for the date originally inserted in it. If the respondent had actually been a party to the transaction I fail to see how any question could have arisen, and the subsequent acceptance by the respondent of the alteration seems to me to place her in the same position as if she had originally been a party to it. The Assurance Society has not raised any objection to pay the sum assured to the respondent on the ground that she cannot take the benefit of the alteration, because she was not a party to it when it was first agreed upon, and in the face of the bargain which the Assurance Society made with the assured it is difficult to see how the Society could have sustained any such objection. Moreover such an objection would not have operated to vest the beneficial interest in the sum assured in the estate of the assured but would at most, if well founded,

C. A. 1927

ROYAL EXCHANGE ASSURANCE v. HOPE.

Lawrence L.J.

have entitled the Assurance Society to have refused to pay the sum assured to the respondent.

If, contrary to my opinion, the question whether the assured acted as trustee for the respondent in making the agreement with the Assurance Society for the extension of the policy were material, I think the fact that at the date of such agreement the written policy was in the possession of the assured as trustee for the respondent and that he caused the Assurance Society to record the agreement on the document which he held as such trustee affords strong, if not conclusive, evidence that in making such agreement he was acting solely for the benefit of and as trustee for the respondent.

In the result I think that the decision of Tomlin J. is right and that this appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Parker, Garrett & Co.*
Solicitors for respondent: *Stilgoes.*

W. I. C.

In re A DEBTOR.

C. A.
1927
Dec. 2, 5.

[883 of 1927.]

Bankruptcy—Receiving Order—Petitioners' Offer to allow Dismissal of Petition on Payment of their Solicitor and Client Costs and of their Costs in other Proceedings—Solicitor and Client Costs paid—Petition dismissed—Second Petition by same Petitioners—Extortion—Receiving Order discharged—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 5, *sub-s.* 3.

A debtor furnished a friend with a cheque for 500*l.* as a deposit in connection with the underwriting of shares by a company in which the friend was interested. The cheque was dishonoured and judgment obtained against the debtor for 500*l.* and 14*l.* 6*s.* costs. On December 3, 1926, the judgment creditors petitioned for a receiving order against the debtor in respect of the judgment debt. From time to time arrangements were made for adjourning the petition, but on March 7, 1927, the petitioning creditors intimated that the conditions on which they would agree to the petition being dismissed were that the debtor should pay 100*l.* and provide a guarantee for payment of the balance of the debt and also agree to pay to the petitioning creditors the costs of their proceedings against the underwriters as between solicitor and client; and the costs of their proceedings against the debtor, also as between solicitor and client. Payment of the costs of proceedings against the underwriters was refused, but payment by the debtor of solicitor and client costs was agreed to. Sums of 50*l.* and 144*l.* were paid by March 15, 1927, when the petition was dismissed. On July 28 the petitioners again commenced proceedings for a receiving order in respect of a sum ascertained by deducting from the original debt and interest and costs as between solicitor and client the payments of 50*l.* and 144*l.* A receiving order having been made by the registrar, the debtor appealed:—

Held, that the acts of the petitioners in seeking to obtain payment of their costs in the proceedings against the underwriters and in obtaining payment by the debtor of their solicitor and client costs amounted to extortion and an abuse of the process of the Court; and therefore that the case fell within the Bankruptcy Act, 1914, s. 5, sub-s. 3, as being one where the Court was satisfied that for sufficient cause no receiving order ought to be made. The receiving order was therefore discharged.

Appeal from Mr. Registrar Warmington.

The debtor, who was an articled clerk to a firm of solicitors and without means, was in July, 1926, requested by one Seyffert, the managing director of a company known as Sherbourne Trust, Ld., to provide him with a cheque for 500*l.* in favour of Messrs. Scott Brothers & Co., stockbrokers, for deposit in respect of some underwriting for his company of debenture stock of the Perak River Hydro-Electric Power

C. A. 1927

A DEBTOR, *In re.*

Co., Ld. The debtor said that he gave the cheque on the understanding that his friend would provide funds to meet the liability, but this was not done; and on presentation for payment the cheque was dishonoured.

Messrs. Scott Brothers & Co. then took proceedings against the debtor, and on November 3, 1926, recovered judgment against him under Order XIV. for 500*l.* and 14*l.* 6*s.* costs. The debtor appealed without success from this judgment and incurred further costs, but ultimately Messrs. Scott Brothers & Co. issued a bankruptcy notice dated November 23, 1926, and on the debtor failing to comply with it brought, on December 3, 1926, a petition for a receiving order. From time to time adjournments of the petition were arranged between the solicitors on either side, and in the meanwhile the petitioners also brought proceedings against the Sherbourne Trust, Ld., in respect of their liability as underwriters.

On February 28, 1927, the debtor wrote to the petitioners pleading for further time, and explaining that he had been misled into giving the cheque for 500*l.*, and he continued: "I now realize that I have to shoulder the responsibility, which unfortunately I am entirely unable to meet at the moment. I do therefore ask you to consider all the foregoing facts before taking the final steps, which will irretrievably ruin my career and which can be of no benefit to yourselves. I am as I have said ill at the moment, but I will get back to London within three days, when providing you can see your way to dismiss this petition, I will hand you the sum of 100*l.* already mentioned and the balance within six months. I do ask you to consider this matter and accept these terms." Upon that the petitioners' solicitors, Messrs. Morley, Shirreff & Co., wrote on March 2 to Messrs. Brighten & Lemon, the debtor's then solicitors, as follows: "Our clients have handed to us a letter from your client purporting to have been written in Paris on the 28th ulto. With regard to the specious explanations and excuses set out in that letter, we may at once say that neither our clients nor ourselves believe or accept them. Our clients are prepared to consent, if the

registrar is agreeable, to the bankruptcy petition presented against your client being dismissed on the following terms being previously thereto complied with: (*a*) The payment of the whole of the costs as between solicitor and client incurred in connection with the proceedings they had to bring against the Sherbourne Trust Limited and your client and which we are prepared to accept 160*l.* in settlement of; (*b*) The payment of 100*l.* towards reduction of the judgment debt of 500*l.* with interest thereon as from the 3rd November, 1926, the date of the judgment; (*c*) the guaranteeing of the payment of the balance of this judgment debt with interest thereon until payment by George Stanley Brighten of your firm. We shall be glad to hear from you if your client is prepared to carry out these terms by the first post on Friday next the 4th instant, so that we can at once submit to you the formal guarantee for approval, as the money must be paid and the guarantee given before the hearing of the adjourned petition on Tuesday next. We write without prejudice. . . . . P.S.—In the event of the petition being dismissed on the above lines, our clients will be prepared to wait a reasonable time for the payment of the above mentioned balance, say two or three months, but will not give any definite undertaking to wait six months."

To that a reply is made by Messrs. Brighten & Lemon on behalf of the debtor: "We have your letter of the 2nd instant and have seen our client thereon as he has now returned from Paris. We are instructed to answer as follows: (*a*) Our client is prepared to pay the proper taxed costs as between party and party with regard to which your clients would be entitled against him personally in the various proceedings; (*b*) Agreed; (*c*) Agreed. (Subject to a proper provision being made as to a reasonable time being given.) In conclusion we would ask you to endeavour to keep this correspondence on the usual and rather higher plane of tone customary in business circles and particularly between solicitors. After all it is not your individual views or ours which count—it is a question of your clients and our client—and remarks calculated in an offensive tone do not tend to

C. A. 1927

A DEBTOR, *In re.*

assist either you or ourselves in bringing to bear that clear consideration which is necessary in order to enable us to advise our respective clients."

On March 7, 1927, a sum of 50*l.* was paid by the debtor, and on March 15, 1927, a further sum of 144*l.* 15*s.* 4*d.* was paid, and thereupon the petitioners submitted to have their petition dismissed. Of the sum of 144*l.* 15*s.* 4*d.* the sum of 94*l.* 15*s.* 4*d.* was in respect of solicitor and client costs.

Further negotiations in regard to the payment of the balance outstanding took place, and on June 14 Messrs. Morley, Shirreff & Co. wrote to Messrs. Brighten & Lemon as follows: "Referring to our interview with you on Friday last, the amount due on the judgment obtained by our clients against you is 400*l.* and interest at 4 p.c. from March 15 last. Our clients are willing to accept payment of this amount by the following instalments, provided the interest at 4 p.c. is added to the instalments every month: 20*l.* on July 1 next, plus interest at 4 p.c. on 400*l.*, the balance of the amount of the judgment from March 15, 1927; 20*l.* on August 1 next, plus interest at 4 p.c. for one month on the balance of the judgment; similar payments on September 1 next; 30*l.* on October 1 next, with interest as aforesaid; similar payments on November 1 and December 1 next; 50*l.* on January 1, 1928, with interest as aforesaid," and similar payments until the debt was exhausted.

The sum of 400*l.* mentioned as the balance of the debt was arrived at by treating the payments made in excess of 100*l.* and interest on the debt as having been paid in respect of solicitor and client costs. The difference between solicitor and client and party and party costs amounted to some 15*l.*

The debtor accepted the terms set out in the letter of June 14, 1927, but at the beginning of July the debtor gave post-dated cheques in respect of the payments of the instalment of 20*l.* and interest. These cheques were dishonoured, and thereupon the petitioning creditors served the debtor with a bankruptcy notice, and on failure to comply with it petitioned for a receiving order, based upon the fact that the debtor was indebted in a sum of 405*l.* 6*s.* 8*d.*, being the alleged balance

C. A. 1927

A DEBTOR, *In re.*

of the original debt and 5*l.* 6*s.* 8*d.* interest. A further small payment was made on October 4 for the purpose of obtaining an adjournment of the petition, but ultimately it came before Mr. Registrar Warmington on November 1, 1927, and he made a receiving order against the debtor. From this order the debtor now appealed.

The appeal was brought on a number of different grounds, but the only one calling for report is that by obtaining from the debtor payment of solicitor and client instead of party and party costs, and seeking to obtain payment by him of their costs of an action against the Sherbourne Trust, Ld., they had been guilty of extortion, and that this afforded a ground for not making the receiving order under the Bankruptcy Act, 1914, s. 5, sub-s. 3.

Clayton K.C. and *Beyfus* for the appellant. The petitioning creditors have been guilty of extortion in requiring the debtor to pay costs for which he was in no way responsible, and that affords sufficient ground for not making a receiving order within the Bankruptcy Act, 1914, s. 5, sub-s. 3. The test whether there has been extortion is whether the petitioning creditor has demanded payment of more than was due to him: *In re Shaw* (1); *In re Goldberg* (2); *In re Atkinson* (3); *In re Otway.* (4) It is immaterial that the attempt at extortion was unsuccessful: *In re Shaw* (1); *In re Otway.* (4) Nor does it matter that the excessive claim was in respect of costs: *In re Crow* (5), when a petition was dismissed by the registrar on the ground that 10*l.* too much was demanded for costs. So, too, it is immaterial that the extortion was connected with the earlier petition that was dismissed: *In re G.* (6) Here the second petition claimed a sum increased by the fact that a payment of 15*l.* was applied in paying the difference between party and party and solicitor and client costs instead of going in reduction of the debt. *In re Bebro* (7) is distinguishable, because in that case the

(1) (1901) 83 L. T. 754.
(2) (1904) 21 Times L. R. 139.
(3) (1892) 9 Mor. 193.
(4) [1895] 1 Q. B. 812.
(5) Unreported.
(6) (1900) 44 Sol. J. 345.
(7) [1900] 2 Q. B. 316.

C. A. 1927 A DEBTOR, *In re.*

additional payment was offered by the debtor, and it is held that there had been no pressure on him to pay it amounting to extortion.

R. Fortune for the respondents. Whether there has been extortion depends on the facts of each particular case: *In re Bebro.* (1) If the process of the Court has been abused that vitiates the proceedings. But the facts of the present case are very special. All that the petitioning creditors demanded was payment in respect of proceedings due to the default of the debtor of the costs which would otherwise fall upon them. It is true that there was also a suggestion that the petitioners' costs of proceedings against the underwriters should be paid, but when the payment was objected to the matter was not pressed. The petitioners are only guilty of extortion when they seek to make a profit to which they are not entitled: *In re Shaw.* (2) Here the petitioners merely asked, as a term of consenting to an adjournment, that they should be indemnified in respect of costs. They were not seeking to make a profit, and they therefore did nothing amounting to extortion. It is of the essence of extortion that some unfair profit should be made: compare *In re Sunderland* (3) when *In re Shaw* (2) was explained and distinguished. If the Court were to hold that an agreement under pressure to pay a sum that in law could not be recovered is sufficient to amount to extortion, then it is suggested that the decision in *In re Bebro* (1) could not be supported. There is a complete distinction between seeking to make an improper profit in bankruptcy proceedings and merely asking to be indemnified.

No reply was called for.

LORD HANWORTH M.R. This is an appeal from an order of the registrar, who on November 1 last made a receiving order against the debtor. The facts preceding that order are a little intricate and rather important. [His Lordship then stated the facts, and after reading Messrs. Morley, Shirreff & Co.'s letter of March 2, 1927, and Messrs. Brighten & Lemon's reply thereto continued:] In my judgment, that

(1) [1900] 2 Q. B. 316. (2) 83 L. T. 754.
(3) [1911] 2 K. B. 658, 667.

C. A. 1927

A DEBTOR, *In re.*

Lord Hanworth M.R.

last letter is a perfectly proper letter to write. I can well understand Messrs. Morley, Shirreff & Co.'s letter of March 2, 1927, arousing a considerable amount of indignation in those who received it. Let us pause to consider what it means. The debtor, a young man whose means are nil, is asked, first, to pay an immediate sum of 100*l.* in reduction of the judgment debt and to provide a guarantee for the payment of the balance of the judgment debt and interest and then to pay the sum of 160*l.* in settlement of the solicitor and client costs incurred in connection with the proceedings that Messrs. Scott Brothers & Co. had brought against him and the Sherbourne Trust, Ld.

The petitioners were not entitled to recover solicitor and client costs against the debtor, and there was no shadow of foundation for a claim against the debtor in respect of the costs incurred by the petitioners in these proceedings against the Sherbourne Trust, Ld. The petitioners were therefore attempting, as the price of the dismissal of the petition and the adjournment for an uncertain time of further proceedings against the debtor, not only to obtain payment of a sum on account of the debt, and a guarantee in respect of the balance, but also to obtain payment by the debtor of some one else's debt and of some costs which he was under no liability to pay.

I do not hesitate to characterize that demand as most improper. Those who are engaged in bringing bankruptcy proceedings must take care that their proceedings do not constitute an abuse of the process of the Court; and to make a demand of this nature was to attempt to extract from the debtor, who was in a most difficult position—he had explained in his letter of February 28, 1927, that the ruin of his future career was involved—costs of an amount in excess of his liability and further costs for which he was under no liability, being costs for which the Sherbourne Trust, Ld., were liable, and an amount in excess of what the Sherbourne Trust, Ld., were liable to pay.

On March 7, 1927, the debtor paid a sum of 50*l.*, and ultimately, on March 15, that petition was dismissed after payment of a further sum of 144*l.* 15*s.* 4*d.* [His Lordship

C. A.
1927
A DEBTOR, *In re.*
Lord Hanworth M.R.

then stated the further facts leading up to the making of the receiving order on November 1, 1927, and continued :] It is beyond question that, in the ordinary course, this matter ought to have passed into bankruptcy. I do not for a moment palliate the conduct of the debtor; he was wrong originally in giving his cheque for 500*l.*; he was wrong in giving his other two cheques which were dishonoured; and he had apparently no ground whatever for hoping that delay would afford him any real relief. It is only necessary to state the facts to show that blame attaches to him; but by the time the matter came to be heard before the registrar certain payments had been made; there was the original payment of 50*l.* in reduction of the debt and the further payment made on March 15, 1927, on which the first petition was dismissed. The sum which was paid then was 144*l.* 15*s.* 4*d.*, and of that sum 50*l.* and no more was credited in reduction of the debt. The result was that by the payments on March 7 and March 15 100*l.* only was taken off the judgment debt, and it is for that 100*l.* that credit is given in the second petition; but the second payment was one of 144*l.* 15*s.* 4*d.*, and of that sum 94*l.* 15*s.* 4*d.* was taken in payment of the solicitor and client costs due from the debtor. We are told that out of that sum of 94*l.* 15*s.* 4*d.* a sum of 15*l.* was appropriated to and received in payment of the margin of solicitor and client costs above the party to party costs to which the petitioners were alone entitled. [His Lordship proceeded to deal with a question not the subject of this report and then continued :] As I have already said, the debtor ought to be made a bankrupt, and in the ordinary course the receiving order would have been a perfectly right order to be made by the registrar; but there is a principle which must be jealously guarded—namely, that the process of the Bankruptcy Court must not be abused. A number of cases have established that. In *In re Otway* (1) the petitioning creditor endeavoured to obtain 25*l.* from a debtor as a condition for agreeing to adjournment of the petition. The attempt failed; but although the petitioning creditor did not succeed the Court

(1) [1895] 1 Q. B. 812.

held that he had attempted to extort money from the debtor for his own purposes, and it declined to allow him to have the advantage of using the process of the Court in Bankruptcy against the debtor. That is a case where an unsuccessful attempt was made, and yet the creditor was debarred from making use of bankruptcy proceedings.

C. A. 1927 A DEBTOR, *In re.* Lord Hanworth M.R.

Again, *In re Atkinson* (1) was a case in which as a consideration for consenting to various adjournments, various sums were paid by the debtor to the petitioning creditor, and it was held that the registrar was wrong in making a receiving order against the debtor, because where a bankruptcy petition had been made use of for an inequitable purpose, such as for the purpose of extorting money from the debtor, it is the duty of the Court to refuse to make a receiving order.

Then there is the case of *In re Shaw* (2), where a suggestion was made that the debtor should sign a promissory note; the debtor declined to accede to the suggestion, and Rigby L.J. said, in dealing with the matter: "If in the same transaction the fraud has been attempted, I think that a debt which has been used as a means of extortion cannot afterwards be made use of as a means of getting a receiving order"; and he agreed that the bankruptcy proceedings should not be permitted.

Lastly, in the case of *In re G.* (3) there had been a first petition, which was dismissed upon the terms of the debtor giving a new promissory note and paying a bonus of 20*l.* to the creditor. The old argument was used, as it always will be in these cases, that surely the creditor was entitled to ask to be recompensed for the indulgence granted, and that it was unexceptionable that his goodwill should be secured upon the terms of the payment to himself; and it was also urged that the transaction was not entered into in the immediate bankruptcy proceedings which were before the Court. Lindley M.R. upheld the view of the registrar, that it was a case of extortion, and said: "Now, there is nothing more familiar in bankruptcy than this—that we are always

(1) 9 Mor. 193. (2) 83 L. T. 754, 755.
(3) 44 Sol. J. 345, 346.

C. A. 1927

A DEBTOR, *In re.*

Lord Hanworth M.R.

entitled to look behind a judgment; and when we look behind the judgment in this case we find that the second promissory note was substantially, to some extent, obtained by extortion based on an abuse of the bankruptcy process."

It is said here that all that was done was that some 15*l.* was obtained from the debtor in respect of costs which he did not owe, costs which were the difference between party and party costs and solicitor and client costs. That is not an accurate way of putting it; the attempt was to obtain not only those costs but also a further sum of 160*l.* in respect of costs which the debtor had no concern with at all. The whole principle of bankruptcy is that when an act of bankruptcy has been committed there shall be a fair distribution between all the creditors, and it is for that reason that the title of the trustee relates back to the earliest act of bankruptcy; and thus where in *Ex parte Edwards* (1) payments were made as the price of an adjournment to the petitioning creditor's solicitor, and he paid them away to the petitioning creditor and agreed to the adjournment, he was held liable to replace the money, as what had been done gave an advantage to the particular creditor, which would not be shared on the basis of equality in bankruptcy proceedings.

I have already referred to Messrs. Morley, Shirreff & Co.'s letter of March 2, 1927. I do not know how it came to be written; I think it must have been written on behalf of the firm whose name it bears by some person with an imperfect knowledge of bankruptcy proceedings and actuated by too much zeal in the matter. I am not going to say anything more about it, except that within the authorities the demands in the letter for sums for which the debtor was under no liability amount to extortion. In fact it resulted in the petitioning creditors obtaining a sum which the debtor was not liable to pay, a sum which ought to be replaced in the debtor's hands. It is a sum for which credit ought to have been given in the true estimate of what had been paid, because, if it had not been taken by the solicitors for their solicitor and client costs, it must have been available for

(1) (1884) 13 Q. B. D. 747.

C. A.
1927
A DEBTOR, *In re.*
Lord Hanworth M.R.

payment of the judgment debt which the debtor owed, so that the balance due would not be 400*l.* but would be less by the amount appropriated to the solicitor and client costs.

In these circumstances, it appears to be quite impossible that the Court should allow the misuse of its procedure by saying that a receiving order ought to be made in this case. The case falls within the Bankruptcy Act, 1914, s. 5, sub-s. 3, as being one where the Court is satisfied that for sufficient cause no order ought to be made.

For these reasons the appeal will be allowed and the receiving order will be dismissed with costs.

SARGANT L.J. I am of the same opinion. I need hardly say that the debtor has not my sympathy in the least. He seems to have been extraordinarily reckless and to have deserved to be made a bankrupt, but the appeal here is founded not on any merits of the debtor but on the alleged disqualification of the petitioning creditor by reason of what is, in bankruptcy proceedings, misconduct. [His Lordship then dealt with certain grounds of appeal which failed and are not the subject of this report and continued:] I now come to what appears to me to be the ground on which the appeal succeeds. It relates to the action of the petitioning creditor in obtaining a sum of 15*l.* in excess of the costs to which he was legally entitled, and, what is much more important, the attempt to obtain 160*l.* for costs as between solicitor and client in respect of a matter for which the debtor was in no way liable. To my mind, that was a demand which comes within the phrase "extortion," as it has been used in the cases to which the Master of the Rolls has referred and to which I will not refer again. It was suggested by Mr. Fortune that *In re Shaw* (1) had been weakened by *In re Sunderland.* (2) In my judgment *In re Sunderland* (2) dealt with a totally different case, and in no way infringes on the principle of *In re Shaw* (1), and, indeed, in the judgment of Buckley L.J., which was quoted by Mr. Fortune in his

(1) 83 L. T. 754. (2) [1911] 2 K. B. 658.

C. A. 1927

A DEBTOR, *In re.*

Sargant L.J.

argument, there were in my view phrases which recognized the general principle of *In re Shaw.* (1) To my mind the attempt to obtain so large a sum as 160*l.* for costs due from some other person for which the debtor could not by any stretch of imagination be deemed to be personally liable, was a very strong instance of an attempt to use bankruptcy proceedings—the threat of bankruptcy—for the purpose of obtaining a collateral advantage unconnected with the bankruptcy for the benefit of the petitioning creditor. It is said that the possible defect in the proceedings was cured, because the petition on which adjudication was asked for was a subsequent petition commenced after the sum of 15*l.* had been provided and the demand for 160*l.* refused. To my mind, looking at the facts in this case, I think there is such a connection between the two petitions by the same creditor against the same debtor, with the debt alleged in the second petition increased by the treatment of this sum of 15*l.* as part of what was due and remained due from the debtor, that the circumstance that the material petition is a subsequent petition and not the original petition makes no real difference. The petition seems to me to be tainted just as in *In re Shaw* (1), and to a very aggravated extent, having regard to the large amount of the sum sought to be added to the liability of the debtor.

I agree that in these circumstances it would be improper to allow the petitioning creditor's petition to succeed, as he has been guilty of conduct which disqualifies him according to the cases from being successful.

LAWRENCE L.J. I agree. In this case the debtor appeals against a receiving order which was made by the registrar on November 1, 1927. The sufficiency of the debts and the act of bankruptcy are not disputed, but the debtor contends that the bankruptcy petition ought to have been dismissed, because he has satisfied the Court under s. 5, sub-s. 3, of the Act of 1918 that for sufficient cause no receiving order ought to have been made against him.

(1) 83 L. T. 754.

C. A. 1927

A DEBTOR, *In re.*

Lawrence L.J.

The debtor alleges that there are several sufficient causes for not making the receiving order, but the only one of any substance is that the petitioning creditors on the occasion of the previous bankruptcy proceedings by them for the same debt attempted to extort the payment of money for which the debtor was not liable as the price of allowing that petition to be dismissed, and that the attempt partially succeeded. Now it is clear from the letter of March 2, 1927, that the petitioning creditors made it a term of the dismissal of the previous bankruptcy proceedings that the debtor should pay the costs which the creditors had incurred in the proceedings against the Sherbourne Trust, Ld., and also the costs which the debtor had become liable to pay to them in proceedings against him, with the addition that this payment was to include the difference between solicitor and client and party and party costs, for which he was in no circumstances liable. Several answers were made on behalf of the petitioning creditors, but the main answer, as I understood Mr. Fortune, was that this was not a case where the petitioning creditors were seeking to put money into their own pockets in making the bargain, but were merely demanding money required to save them from loss. I confess to not understanding the difference between a person asking for a sum of money in order to save himself from loss and asking for a sum of money in order to make a profit. In both cases the money is for the personal benefit of the recipient, although in the one case he may utilize it for the payment of a debt. A further answer was made as regards the costs of the Sherbourne Trust, Ld.—namely, that the demand for those costs was declined and was not pressed; and as regards the difference between solicitor and client and party and party costs of the proceedings against the debtor himself, it was said that that payment was not inequitable, but was one for recouping the creditors for costs which they had had to pay owing to the conduct of the debtor.

None of these answers, in my judgment, is sufficient. It cannot, in my opinion, be too clearly understood that bankruptcy proceedings, which are in their nature quasi criminal,

C. A. 1927

A DEBTOR, *In re.*

Lawrence L.J.

must not be used for the purpose of obtaining a collateral advantage. An attempt to do so, even though unsuccessful, will be sufficient to disentitle a petitioning creditor to an order, and, therefore, the fact that in the present case the debtor refused to pay the costs of the Sherbourne Trust, Ld., and that that demand was not insisted upon, does not absolve the petitioning creditors from the consequences of having made that demand. The principle upon which the Court acts in these cases is that it treats a demand of this nature as evidence that bankruptcy proceedings were taken not with the bona fide intention of obtaining adjudication but for some collateral purpose.

As regards the demand for solicitor and client costs in the action against the debtor, I agree with Mr. Fortune that it stands on a somewhat different footing, but it has this vice in it, that it was a demand for a sum for which the debtor was not legally liable, and that demand was acceded to and has, to a certain extent, succeeded. If these demands had been made in the proceedings now before the Court, then speaking for myself I should have had no hesitation in declining to make a receiving order upon the petition. Does it make any difference that the demands were made in previous bankruptcy proceedings? Having studied the cases upon the subject I am of opinion that it does not. *In re G.* (1) and *In re Bebro* (2) show that the same principle applies where the improper demand is made in antecedent proceedings as when it is made in the existing proceedings. In both those cases there was some misconduct in a previous bankruptcy proceeding and a second petition was presented. In *In re G.* (1) antecedent proceedings were utilized for the purpose of obtaining a collateral advantage—namely, a bonus or higher rate of interest on the debt—and the second petition was then presented for the purpose of enforcing the arrangement which had been come to on the dismissal of the first petition. *In re Bebro* (2) was the same kind of case, but the Court held in the circumstances of that case that the arrangement was a bona fide arrangement made openly and

(1) 44 Sol. J. 345. (2) [1900] 2 Q. B. 316.

without fraud on the other creditors, and, therefore, that the second bankruptcy petition was one that did not come within s. 5, sub-s. 3, as constituting sufficient cause for not making a receiving order. *In re Shaw* (1) and *In re Goldberg* (2) were cases of a different nature. In both these cases, before any bankruptcy proceedings had been commenced, the particular creditor had sought to obtain a fraudulent advantage over the other creditors in connection with an assignment for the benefit of creditors, and it was held that a petition by that creditor, founded on the assignment for benefit of creditors in which he had tried to gain a secret advantage, ought to be dismissed. The last case to which I will refer, *In re Sunderland* (3), was a similar case to *In re Shaw* (1) and *In re Goldberg* (2), but on the other side of the line. In that case it was held that the arrangement which the creditor sought to make on the occasion of the assignment for the benefit of the creditors was a bona fide arrangement made openly, and that it did not prevent the creditor, when his suggestion was not accepted, from making the assignment for the benefit of the creditors the foundation of a subsequent petition.

Applying the underlying principle of all those cases to the present case, it seems to me to be clear that the creditors here have utilized bankruptcy proceedings for the purpose of extorting, or attempting to extort, money from the debtor for which the debtor was in no sense liable. In other words, the petitioning creditors have utilized bankruptcy proceedings for a collateral purpose, and that is a thing which the Court does not allow.

For these reasons I agree that the appeal ought to be allowed and the receiving order be discharged.

Appeal allowed.

Solicitors: *Isadore Goldman & Son; Morley, Shirreff & Co.*

(1) 83 L. T. 754. (2) 21 Times L. R. 139.
(3) [1911] 2 K. B. 658.

H. C. G.

C. A.
1927
Dec. 6.

In re BROOKS.

PUBLIC TRUSTEE *v.* WHITE.

[1927. B. 2006.]

Will—Construction—Residuary Gift—Life Interest to Testator's Widow—Remainder to Children or their "Personal representatives"—Whether Executors or Next of Kin.

Testator devised and bequeathed his residuary estate to his trustees upon trust to pay the income thereof to his widow (now dead) for life and after her death to divide the same equally between his seven children (whom he named) during their respective lives, and from and after the death of any child whether in his lifetime or after his decease to hold one-seventh of the capital of his estate to the income of which such child should have been entitled or in the case of a child predeceasing him such share as would have accrued to such child under the will if he or she had survived the testator upon trust for the "personal representatives" of that child:—

Held, that the words "personal representatives" must receive their ordinary meaning of "executors or administrators," and that on the death of the widow the seven children became absolutely entitled to their respective shares in the testator's residuary estate.

In re Crawford's Trusts (1854) 2 Drew. 230 followed.

Bridge v. *Abbot* (1791) 3 Bro. C. C. 224; *Cotton* v. *Cotton* (1839) 2 Beav. 67 overruled.

Appeal from a decision of Eve J.

Isaac Thomas Brooks by his will, dated January 24, 1921, after appointing the Public Trustee and his son Thomas John Brooks to be the executors and trustees thereof devised and bequeathed all his real and personal property to his trustees upon trust to sell call in and convert into money the same or such part thereof as should not consist of money and to invest the same upon trust securities with power from time to time at their discretion to vary such investments and the testator thereby directed his trustees to pay the income thereof to his wife Rachel Brooks during her life and from and after her decease to divide the same income equally between his seven children therein named during their respective lives and from and after the death of any of the said children whether in the testator's lifetime or after his

decease the testator directed his trustees to hold the one-seventh share of the capital of his estate to the income of which such child should have been entitled or in the case of predeceasing him would have been entitled had he or she survived him, under his will in trust for "his or her personal representatives." And after giving to his trustees a power to postpone sale at their discretion the testator declared that the income for the time being of such portion of the said real and personal estate as should not be sold should be applied in the same manner as the income of the proceeds of sale would have been applicable if the said estate had been sold.

The testator died on March 15, 1921, without having altered his said will leaving all his said seven children him surviving.

The will was duly proved by the executors therein named on July 7, 1921.

Rachel Brooks, the testator's wife, died on December 7, 1926.

The residuary estate of the said testator was of a value of 4949*l.* 7*s.* 4*d.* or thereabouts.

The question having arisen whether on the true construction of the will the seven children of the testator became on the death of the testator's widow absolutely entitled to their respective shares in the testator's residuary estate or to a life interest therein the Public Trustee as one of the executors and trustees of the will took out the present summons for the determination of that question.

Eve J., considering himself bound by *Bridge* v. *Abbot* (1) and *Cotton* v. *Cotton* (2), held that the seven children were not absolutely entitled to their shares but only to a life interest therein.

The children of the testator appealed. The appeal was heard on December 6, 1927.

Sir Thomas Hughes K.C. and *L. F. Potts* for the appellants. In the present case it is submitted that the words "personal representatives" mean "executors or administrators." There

(1) 3 Bro. C. C. 224. (2) 2 Beav. 67.

C. A. 1927 BROOKS, *In re.* PUBLIC TRUSTEE *v.* WHITE.

is no question that that is their prima facie meaning; but the context may show that they mean something different: *In re Crawford's Trusts* (1); *King* v. *Cleaveland* (2); *In re Ware* (3); Hawkins on Wills, 3rd ed., p. 140. In *Bridge* v. *Abbot* (4) and *Cotton* v. *Cotton* (5) "legal representatives" were held to mean "next of kin"; but it is submitted that those cases are not binding on this Court and ought not now to be followed. They were followed by Kay J. in *In re Thompson* (6) not because he considered them to be good law, but because he could find no reported case which expressly overruled them. In Hawkins on Wills, 3rd ed., p. 143, Mr. Hawkins questions whether those cases are law at the present day.

[LORD HANWORTH M.R. referred to *Corbyn* v. *French*. (7)]

In the present will there is nothing to prevent the words "personal representatives" receiving their ordinary meaning of executors or administrators, and it is submitted therefore that the children are absolutely entitled to their respective shares in the testator's residuary estate.

[SARGANT L.J. referred to *In re Birks*. (8)]

[They also referred to *Alger* v. *Parrott* (9) and Key and Elphinstone's Conveyancing, 9th ed., vol. ii., p. 791n.]

George G. Solomon for the testator's four infant grandchildren. I submit that the words "personal representatives" here mean next of kin, and in support of this contention I rely on the words "whether in my lifetime or after my decease." In the Statute of Distributions (22 & 23 Car. 2, c. 10), s. 6, it is clear that the words "legal representatives" mean issue and not executors. That is an illustration of a case in which the words do not mean executors. I also rely strongly on *Bridge* v. *Abbot* (4) and *Cotton* v. *Cotton* (5), as explained in *In re Crawford's Trusts* (1) and recognized as correct in *King* v. *Cleaveland* (2) and followed in *In re Thompson*. (10) These cases show that as regards children

(1) 2 Drew. 230.
(2) (1859) 4 De G. & J. 477.
(3) (1890) 45 Ch. D. 269.
(4) 3 Bro. C. C. 224.
(5) 2 Beav. 67.
(6) (1886) 55 L. T. 85, 87.
(7) (1799) 4 Ves. 418.
(8) [1900] 1 Ch. 417.
(9) (1866) L. R. 3 Eq. 328.
(10) 55 L. T. 85.

who the testator contemplated might die in his lifetime "personal representatives" mean statutory next of kin. The words are used in this will in respect not only of children who might die in the testator's lifetime but also of children who might survive him, and cannot in the same place have two different meanings, and so consequently in respect of all the children, whether predeceasing or surviving the testator, the words mean statutory next of kin.

The fact that a prior life interest is given to the testator's widow cannot affect the construction of the words. Kindersley V.-C. in *In re Crawford's Trusts* (1) dealt with two kinds of cases, first, an immediate substitutional gift, and secondly, a gift after a life interest on the footing that the intended legatee survived the testator, for if the legatee predeceased the testator the legacy would have lapsed, as in the case of the child John in *Corbyn* v. *French*. (2) In the present case special provision is made with regard to the possibility of children predeceasing the testator, and that case is not dealt with in *In re Crawford's Trusts*. (1) *Bridge* v. *Abbot* (3) and *Cotton* v. *Cotton* (4) apply, although a life interest is interposed and the gift is not immediate.

The testator could have given an absolute interest to his children if he had chosen, but he did not do so: he expressly gave them a life interest only, and made a distinction between income and capital.

In *Alger* v. *Parrott* (5) there was no provision, as there is here, for the case of a legatee dying in the testator's lifetime.

The testator here cannot have intended to benefit the creditors of the legatee.

The Wills Act, s. 33, only applies in the special case of a child having issue living at the death of the testator; it does not apply generally. It throws no light on the present case.

It is submitted therefore that a child takes a life interest only, and that on his death the share passes to his next of kin.

J. H. Stamp for the executors and trustees of the will.

(1) 2 Drew. 230.
(2) 4 Ves. 418, 435.
(3) 3 Bro. C. C 224.
(4) 2 Beav. 67.
(5) L. R. 3 Eq. 328.

C. A. 1927 — BROOKS, *In re.* PUBLIC TRUSTEE *v.* WHITE.

LORD HANWORTH M.R. This is an appeal from a decision of Eve J., who had to determine the true interpretation of a will on an originating summons. I have come to the conclusion that the appeal must be allowed.

The facts can be stated very shortly. The will is that of Isaac Thomas Brooks, dated January 24, 1921, the testator having died on March 15 in the same year. He left surviving him seven children. The widow died in December, 1926, the seven children having survived both the father and mother. The question is whether under the terms of the will the children take absolute interests in the one-seventh share which the father left to each of them in his residuary estate by his will. The will provides: "I direct that my trustees shall pay the income thereof to my wife Rachel Brooks during her life And from and after her decease shall divide the same income equally between my seven children Florence Rachel Brooks, Amy Brooks, Edith Brooks, Louisa Grace Brooks, Thomas John Brooks, Lilian Brooks, and Frederick Harold Brooks during their respective lives And from and after the death of any of my said children whether in my lifetime or after my decease I direct that my trustees shall hold the one-seventh share of the capital of my estate to the income of which such child shall have been entitled or in the case of predeceasing me would have been entitled had he or she survived me under this my will in trust for his or her personal representatives."

The question is how are the words "personal representatives" to be interpreted. Are they to be construed as meaning the executors and administrators of any one of the children, or as meaning that the next of kin of the child would take his share?

It is agreed by both sides, and it is quite clear that the ordinary meaning of the term "personal representatives" is executors or administrators. The judgment of Kindersley V.-C. in *In re Crawford's Trusts* (1) states the rule quite clearly, and the Vice-Chancellor said that the term meant the representatives appointed as the executors

(1) 2 Drew. 230, 234, 237.

under the will, or the administrators of the estate, the word "representatives" being apt for such a meaning, and not for meaning next of kin, these being in no sense representative, and he also gave prominence to the salutary rule that the primary meaning ought to be given to the words unless the context requires some other meaning to be given. He further said that the burden of proof that the words were intended to be used in some other sense must be borne by those who so contended. It is said by Mr. Solomon that if you take the event of a child dying in the lifetime of the testator it would appear more probable that the words connote next of kin, rather than the other meaning, but we have to construe the will not having regard to one possibility but to the general events which might happen. No doubt the testator contemplated children surviving both himself and his widow. From that point of view one can start with the idea that the words, generally speaking, refer to executors and administrators.

There are two cases, *Bridge* v. *Abbot* (1) and *Cotton* v. *Cotton* (2), which show that the words are to be construed, as they were therein, as meaning next of kin, but I think that one must bear in mind that the gift to the children in the present case is not an immediate gift, but one in remainder. I observe that in *In re Ware* (3) Stirling J. refers to the judgment of Kindersley V.-C. in *In re Crawford's Trusts* (4) and states his entire agreement with the principles there laid down.

A case in which the reasoning in *In re Crawford's Trusts* (4) was not followed was *In re Thompson.* (5) In that case Kay J. followed *Bridge* v. *Abbot* (1) and *Cotton* v. *Cotton* (2), not because he considered them powerful authorities, but because he could find no considered authority which overruled them. I need not read again the passages in *In re Crawford's Trusts* (6) in which the Vice-Chancellor commented upon *Bridge* v. *Abbot* (1) and *Cotton* v. *Cotton.* (2) He

(1) 3 Bro. C. C. 224.
(2) 2 Beav. 67.
(3) 45 Ch. D. 269, 277.
(4) 2 Drew. 230, 243.
(5) 55 L. T. 85, 87.
(6) 2 Drew. 230.

C. A. 1927

BROOKS, *In re.* PUBLIC TRUSTEE *v.* WHITE.

Lord Hanworth M.R.

thought they were illustrations of the decisions in which the term "representatives" or "legal representatives" had been held not to mean executors or administrators. But I think it appears from *In re Crawford's Trusts* (1) that where, as in the present case, there is a life interest given in priority to the estate taken by the children, the words must mean executors or administrators, although where the gift is immediate they may mean next of kin. The decision in *In re Crawford's Trusts* (1) was that where there was a life estate in priority, then there was no ground for setting aside the ordinary meaning—namely, executors or administrators. If it is necessary to express an opinion on *Bridge* v. *Abbot* (2) and *Cotton* v. *Cotton* (3), I bring myself into line with others who could not follow them, and if by this decision they are to be considered as overruled perhaps good will be done. This appeal must therefore be allowed.

SARGANT L.J. I am of the same opinion. Eve J. may have been bound by *Bridge* v. *Abbot* (2) and *Cotton* v. *Cotton* (3) and have been right in following them: but they are not binding in this Court.

Mr. Solomon, who appears for infants, put forward a very ingenious argument. He said that *Bridge* v. *Abbot* (2) and *Cotton* v. *Cotton* (3) were properly decided, because where there are alternative gifts on death in the lifetime of the testator he cannot mean "legal personal representatives" in the ordinary sense, since the legatee would never know that he had acquired this benefit and it might all go to his creditors; and he urged that those considerations were sufficient to prevent the words having a meaning other than next of kin. I do not think that that argument is altogether sound here, as the testator was contemplating not only the event of the beneficiaries dying in his lifetime but also the more probable event of their surviving him, and in that alternative event at any rate there is, I think, no reason for giving the words "personal representatives" any other than their ordinary meaning.

(1) 2 Drew. 230. (2) 3 Bro. C. C. 224.
(3) 2 Beav. 67.

Further I think it is time to consider whether the two cases of *Bridge* v. *Abbot* (1) and *Cotton* v. *Cotton* (2) ought to stand any longer. They were doubted in the first edition of Hawkins on Wills, and the effect of the decision in *In re Thompson* (3) was to shake their authority. Indeed it would be difficult to find language which more clearly indicates disapproval than that of Kay J. in *In re Thompson* (3); for the learned judge there followed them merely on the ground that he could find no authority to overrule them. *King* v. *Cleaveland* (4) has been referred to by Mr. Solomon as approving *Bridge* v. *Abbot* (1) and *Cotton* v. *Cotton* (2); but I cannot find that this is the case. The Lord Chancellor, Lord Campbell, merely refers to those two cases as instances where the words "personal representatives" had been given a meaning other than their ordinary meaning; he does not in terms approve them and they were clearly inapplicable in *King* v. *Cleaveland* (4), since there the residuary estate was given to persons to be equally divided share and share alike. And neither Knight Bruce L.J. nor Turner L.J. mentions either of those two cases.

In my judgment there was not enough in either *Bridge* v. *Abbot* (1) or *Cotton* v. *Cotton* (2) to justify an interpretation which departed from the ordinary meaning of the phrase "personal representatives." The mere possibility that if the legatee died insolvent the gift would enure solely for the benefit of his creditors does not seem to me sufficient for that purpose. And it may be noticed that considerations of that kind did not prevent the enactment of s. 33 of the Wills Act, 1837, which, while saving testamentary benefits from lapsing in certain cases where it may be presumed that a testator would desire them to be preserved, simply makes these benefits part of the deceased legatee's estate for all purposes, including liability for debts and death duties.

In my judgment Kay J. in *In re Thompson* (3) and Mr. Vaughan Hawkins in the first edition of his book on Wills were justified in doubting whether *Bridge* v. *Abbot* (1)

(1) 3 Bro. C. C. 224.
(2) 2 Beav. 67.
(3) 55 L. T. 85.
(4) 4 De G. & J. 477.

C. A. 1927

BROOKS, *In re.* PUBLIC TRUSTEE *v.* WHITE.

and *Cotton* v. *Cotton* (1) could be relied upon; and we ought now to hold that those decisions were wrong; and accordingly this appeal should be allowed.

LAWRENCE L.J. I agree. It is apparently not disputed that the primary meaning of the words "personal representatives" is "executors or administrators," nor that the rule of construction is that words must be given their primary meaning unless there be found something in the context inconsistent with that primary meaning. Further it is well established that a gift to A. for life with remainder to his representatives operates as an absolute gift to A. What is there in this will inconsistent with the use of the words "personal representatives" in their primary meaning? It has been contended that the addition of the phrase "whether in my lifetime or after my decease" has the effect of changing the meaning of "personal representatives" from "executors and administrators" to "statutory next of kin," and in support of that contention Mr. Solomon has relied upon the decisions in *Bridge* v. *Abbot* (2) and *Cotton* v. *Cotton*. (1) I agree with what has been said by Sargant L.J. with regard to those two cases. In my opinion the reasons given by the Lord Chancellor in *King* v. *Cleaveland* (3) why those two cases might be supported are unconvincing and are moreover not alluded to by either of the Lords Justices who were parties to that decision. In these circumstances I am of opinion that it cannot properly be said that the Court of Appeal in *King* v. *Cleaveland* (3) approved of the two cases in question which in my judgment ought now to be overruled.

In the present case there is a further distinction in that the Court is not dealing with a substitutional gift; here we have an original gift to the seven children, which in law amounts to an absolute vested gift immediately on the testator's death, whether they survived that event or not, subject only to the life interest of the widow, and in

(1) 2 Beav. 67. (2) 3 Bro. C. C. 224.
(3) 4 De G. & J. 477.

my opinion the case is indistinguishable from the decision of Wood V.-C. in *Alger* v. *Parrott.* (1) I agree that this appeal succeeds.

Appeal allowed.

Solicitors: *Ford, Lloyd & Co.; A. W. Lemon.*

W. I. C.

In re WHEATER.

[319 of 1924.]

Lunacy — Receiver — Lunatic's Business carried on by Receiver — Order for Payment by Receiver to Post-receivership Creditors—Creditors not Parties to Order—Death of Lunatic before Order completed—Claim by Creditors to charge on Moneys ordered to be paid—Payment out of Fund in Court to Executors of Lunatic—Administration Action.

On May 26, 1927, the receiver of a lunatic's estate, who had been authorized to continue the lunatic's business, obtained an order from the Master in Lunacy directing him to distribute a sum of 1800*l.* amongst certain scheduled creditors of the business whose debts had been incurred subsequently to the date of the receivership order. The scheduled creditors were not parties to the order. On May 29, three days after the order was pronounced and before it was completed, the lunatic died. The order was subsequently completed on June 14, 1927. In July the executors of the lunatic's will applied for an order for payment out of Court to them of the fund representing the lunatic's residuary estate, and on July 28 the Master in Lunacy refused to make the order except upon the terms of effect being given to the order of May 26, 1927. Subsequently to the making of this order an order was made for the administration of the lunatic's estate.

On appeal from the Master's order of July 28:—

Held, that the order of May 26 was a mere direction to the receiver to make the payments in question which might have been varied or rescinded at any time by the Master before it was finally completed, and that it gave the creditors no equitable charge on the 1800*l.* thereby ordered to be distributed among them.

Held, also, that the jurisdiction in lunacy ceased on the death of the lunatic, and that the Master had therefore no jurisdiction to direct that effect should be given to the order of May 26.

Held, therefore (reversing the order of the Master), that the executors were entitled to the fund in Court without regard to the order of May 26; but that inasmuch as an order had since been made for the administration of the lunatic's estate, the fund must be paid to the credit of the administration action.

In re Bennett [1913] 2 Ch. 318 approved.

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(1) L. R. 3 Eq. 328.

C. A. 1927

WHEATER, *In re.*

APPEAL from a decision of the Master in Lunacy.

Harry Wheater, who formerly carried on the business of a building contractor under the name of A. and S. Wheater, by his will dated March 27, 1924, appointed his brother, Charles Wheater, William Frederick Foster and Henry Hugh Lavington executors and trustees thereof.

On April 10, 1924, H. Wheater was certified a lunatic, and on the same day C. Wheater was appointed interim receiver of his estate.

On May 1, 1924, C. Wheater, having completed his security, was by an order of that date appointed receiver and was directed (inter alia) to continue the lunatic's business.

On March 17, 1925, an order was made directing the receiver to distribute a sum of 4000*l.* amongst the lunatic's creditors generally.

On June 17, 1926, an order was made directing the receiver to distribute a further sum of 4000*l.* amongst the lunatic's creditors who had become such after the date of the receivership order of May 1, 1924.

By an order dated May 26, 1927, and made upon the application of the receiver, the receiver was directed to apply a sum of 1800*l.* in making a further payment pro rata on account of the claims in respect of trade debts, insurance and commissions and personal debts incurred since the date of the receivership order of May 1, 1924, and specified in an exhibit referred to in the order of June 17, 1926. The creditors referred to in the exhibit were not parties to the order.

On May 29, 1927, three days later, the lunatic died.

On June 2, 1927, an order was made, on the application of the receiver, dealing with the costs incurred by him in respect of certain actions with reference to the lunatic's estate.

On June 14, 1927, the order of May 26, 1927, was passed and entered.

On July 22, 1927, a summons was taken out by the executors of the lunatic's will asking that the receiver should be directed to pass his final account, and (para. 5) that the residue of

the funds in Court, after providing for the costs directed to be paid by the order of June 2, 1927, should be transferred and paid to the executors.

The summons was heard before the Master in Lunacy on July 28, 1927, who, basing his decision on *In re Marman's Trusts* (1), held that the order of May 26, 1927, was still an effective order, and refused to make an order on para. 5 of the summons except upon the terms of effect being given to the order of May 26.

On July 29, 1927, C. Wheater, who claimed to be a large creditor of the lunatic, commenced an action against his co-executor for the administration of the lunatic's estate, and on November 8 the usual creditors' administration order was made.

The executors appealed from the Master's order of July 28, 1927. The appeal was heard on December 12, 1927.

Jenkins K.C. and *Harold Simmons* for the appellants. The order of May 26 lapsed by reason of the death of the lunatic before it was perfected and cannot now be made effective. The jurisdiction in lunacy over the lunatic's property determines on the death of the lunatic, except as to costs given by s. 109 of the Lunacy Act, 1890 : see Theobald on the Law relating to Lunacy, p. 548. Rule 46 of the Lunacy Rules, 1892, gives power to the Master to order payment out of the fund in Court to the person entitled, and r. 81 gives power to order payment to the personal representatives of the lunatic. If the personal representatives ask that the fund in Court may be sold and the proceeds paid to them, such an order may properly be made : Theobald, p. 495.

In *In re Marman's Trusts* (1), upon which the Master relied, the order was made not in Lunacy but in the Chancery Division. The guardians there were parties to the order. Here the creditors to whom payment was ordered were not parties to the order. The case has therefore no application to the present.

(1) (1878) 8 Ch. D. 256.

C. A. 1927

WHEATER, *In re.*

That the death of the lunatic terminates the office of the receiver is shown by *In re Bennett* (1) and *In re Walker.* (2) The committee or receiver is the attorney or statutory agent of the lunatic: *In re E. G.* (3), and his authority therefore ceases on the lunatic's death. Before the order was drawn up the Master had complete seisin of it and could have rescinded or varied it: *Metcalfe* v. *British Tea Association* (4); but it is clear that he could not have made a fresh order after the lunatic's death. The order speaks from the time it is drawn up.

Owen Thompson K.C. and *P. B. Morle* for the respondents, the Thornhill Saw Mills and Joinery Company, Ld., creditors for debts incurred after the date of the receivership order. The order of May 26 operated as from its date as an equitable charge in favour of the creditors to whom payment was ordered to be made. If therefore the order gave the creditors that right they ought not to lose it by reason of the failure of the hand through which they were to be paid. It is not necessary that a person should be a party to an order to obtain a right under it. Communication to the creditors does not differentiate this case from *In re E. G.* (5) Here the axe had fallen after the rights of the parties had crystallized.

[LAWRENCE L.J. Is the order of May 26 an order in favour of these creditors at all? Is it not rather a domestic direction to the receiver?]

It is a direction that the receiver should pay certain sums of money to the persons named in the schedule, and the effect of the order was that it gave an immediate right to the creditors so named to payment. The order having been drawn up dates back to the day on which it was pronounced: Order LII., r. 13—namely, three days before the death.

The creditors named had supplied goods to receiver in order to enable him to carry on the lunatic's business. *In re Bennett* (6) was the case of an order for payment to volunteers.

(1) [1913] 2 Ch. 318, 323.
(2) [1907] 2 Ch. 120, 124, 125.
(3) [1914] 1 Ch. 927, 933.
(4) (1881) 46 L. T. 31.
(5) [1914] 1 Ch. 927.
(6) [1913] 2 Ch. 318.

Tomlin for the respondents, the South Western Stone Company, Ld., creditors for debts, was incurred partly before and partly after the receivership order. As the post-receivership debts of these creditors are small compared with their pre-receivership debts they support the argument put forward on behalf of the appellants.

LORD HANWORTH M.R. This case raises an interesting point in lunacy practice. The patient was certified a lunatic in 1924. On May 1 of that year a receiver of his estate was appointed. The lunatic had been engaged in building operations. His business was considerable, and it was thought that it would be for the benefit of his creditors that it should be continued, and accordingly the receiver was authorized to continue it. In March, 1925, an order was made authorizing the receiver to distribute a sum of 4000*l.* amongst all the creditors generally. On June 17, 1926, there was an order made for the distribution of another sum of 4000*l.* amongst creditors who were creditors after the receivership order. On May 26, 1927, an order was made to raise out of the assets of the estate (which included sums of Conversion Loan and War Stock) a sum of 1800*l.*, which was to be paid amongst the creditors as existing after the receivership order. That order was not then perfected. Three days later the lunatic died; that was on May 29. On July 22, 1927, a summons was taken out by the executors, asking that the receiver should pass his final account and (para. 5) that the residue of the funds in Court after providing for the costs directed to be taxed and paid by the order of June 2, 1927 (referred to in para. 2 of the summons) should be transferred to the executors. On July 28 that summons was heard, and the Master refused to make an order on para. 5 of the summons, except on the terms that the order of May 26 should be given effect to, and that the 1800*l.* should be distributed amongst the creditors as by that order provided. The executors now appeal, and they say that the right to receive the balance of the estate has passed to them, and that they, as executors, are now entitled to receive the money of the lunatic. On

C. A. 1927

WHEATER, *In re.*

Lord Hanworth M.R.

the other hand there are creditors here before us who would have received money under the order of May 26 to pay out that sum of 1800*l.*, and they say that though the order was not drawn up when it was pronounced yet having been subsequently completed it is an effective order within the meaning of Order LII., r. 13, and dates back to the time when it was pronounced. Now it seems to me that that contention, which has led to a very interesting argument, is not correct. The receiver is introduced in Lunacy not as a receiver in ordinary Chancery proceedings. He is placed there to deal with money as agent of the lunatic, who will still, and always, be his principal. The Court has jurisdiction in Lunacy only so long as the lunatic is alive, or remains insane. The power of the Court would and does determine when the lunatic recovers, and it seems to me that the power of the Court must also be determined by the lunatic's death. In the present case the lunatic's death took place at a time when an order for dealing with his estate had been made but not perfected, and I think that after the death all the estate of the lunatic passed to his executors.

Now what is the position of these creditors, and what are their rights under that order of May 26? They were not represented at the making of that order. The order was made in their interests, it is true, and they would have received benefits under it, but at the same time it was made quite independently of them, probably without their knowledge as to its terms, and it did not, I think, give any right or title to persons named in it or coming under its provisions, whether or not they had any knowledge of it, before or after it was made; in my opinion, they were complete strangers to the making of it. If they had been entitled to payment under a contract with the receiver and nothing remained to be done but that payment should be made to them, and the order was to that effect, then the position might have been different, but as matters stand it seems to me that, so far from these creditors being in any way concerned in the making of the order, they were strangers to it when it was made.

C. A.
1927
WHEATER, *In re.*
Lord Hanworth M.R.

It is said in argument that the position might have been different if the order had not been made until the death of the lunatic, but that as it had been actually made before his death, it must stand and effect be given to it. To me, however, it seems that for this purpose we must regard the order as not being perfected. Until it is actually effective, and has been put into operation, there is an opportunity for those applying for it, or even for those affected by it, to make application to have it varied, or rescinded, and therefore I think that it is not yet a perfected order, and I do not think that that is inconsistent with the fact that if and when ultimately perfected it speaks from the date when it was first made, in this case May 26.

Moreover, the creditors have another difficulty in supporting their claim, because the order was made in Lunacy, dealing with funds which are in Lunacy, and I think that such an order was never intended to deal with the case where the funds were no longer in Lunacy. This is not a case where, as under the terms of Order XVII., r. 4, a cause or matter does not become abated by reason of the death of one of the parties. Here, before the order was perfected, there was a transmission of the interest in the lunatic's assets to the executors. In my opinion the reasoning in *In re Bennett* (1) is applicable to this case. There the mother was a lunatic. She had daughters, and there had been a system in force under which sums had to be paid to the daughters and other sums reserved for the lunatic. As regards the balance over after providing for the keep of the lunatic, an order was made for payment to the daughters. The lunatic died, and the daughters claimed certain payments as payable to them under the order. Warrington J. (as he then was) says (2): "The balance of the fund now in question, 609*l.* 18*s.* 5*d.*, represents income accrued but not paid during the lifetime of the lunatic; it was never paid to the committee at all, but was an apportioned part of the income received by the administrator after the death of the lunatic. As to the last there can be no question whatever. No order in lunacy can affect

(1) [1913] 2 Ch. 318. (2) [1913] 2 Ch. 323.

C. A. 1927 WHEATER, *In re.* Lord Hanworth M.R.

that which never came into the hands of the committee; that part of the fund clearly forms part of the estate in the administrator's hands. The only possible question is with regard to the 711*l.* 6*s.* 7*d.*, income received by the committee but not expended by him. Mr. Skinner contends that this sum ought to be dealt with in the manner provided by the order of March 12, 1908, or by that order as modified by the sanction or order of July 20, 1911. It is unnecessary to consider whether a sanction by the Master is equivalent to an order. Speaking offhand I should say it was. I will treat the matter, however, as if it depended on the order of March 12, 1908. Is there any jurisdiction now to order that the fund shall be dealt with as if the lunatic was still alive? In my opinion there is not. On the death of the lunatic the committee ceased to have any authority to deal with money in his hands except as the Rules in Lunacy provide—i.e., to hand it over to the administrator or to pay it into Court. Except for this purpose the powers and duties of the committee come to an end on a supersedeas or the death of the lunatic." So in the present case it appears to me that on the death of the lunatic on May 29 all the powers of the receiver came to an end. He had one duty only—namely, to ascertain the balance of the lunatic's funds and hand it over to the executors—and if it seems hard that he could not pay that sum of 1800*l.* to those creditors for whom it was intended, that only means that the changes and chances of this mortal life have intervened to prevent him from doing so. The creditors still have their hopes out of the estate, but it seems that even if the lunatic had remained alive, they would not have taken any ascertained interest in the funds until it was paid over to them.

I think therefore that before the order was made complete the Lunacy jurisdiction ceased entirely, and that the executors became entitled to the moneys and securities remaining in the estate. As however I understand that an order for administration of the estate has been made, the order will be that the money in the hands of the receiver in Lunacy be paid over to the credit of the action without prejudice to the

right (if any) of the receiver to retain the same or any part thereof in respect of his claim to a debt incurred before the receivership order.

SARGANT L.J. I am of the same opinion. The lunatic before he was so certified carried on a considerable business as a building contractor. On May 1, 1924, Charles Wheater, his brother, was appointed receiver of the estate in Lunacy with power to continue the business which it was thought would be for the benefit of the creditors. Charles Wheater in that capacity as agent of the lunatic incurred further liabilities, and the question now arises whether there can be a preferential payment to creditors who have become creditors since the receiver of the lunatic's estate was appointed or whether the money ought to be paid to all the creditors of the lunatic.

On May 26, 1927, an order was made on the application of the receiver under which a sum of 1800*l.* was to be distributed amongst creditors who had become so since the date when the receiver was appointed. That order was made on the application of Charles Wheater alone, and would have been drawn up and completed in the course of a few days but for the fact that within three days of the making of that order the lunatic died, and nothing was paid under it. Subsequently, on July 22, 1927, the executors of the will of the lunatic applied by summons to the Master in Lunacy for an ordinary order that all the assets of the lunatic should be handed over to them. The Master took the view that the order of May 26, 1927, was an order which, though not perfected in the lunatic's lifetime, had given definite rights to the persons amongst whom the receiver would have distributed the 1800*l.*, and he therefore declined to make the order asked for by the executors, except upon the terms of the order of May 26, 1927, being carried out. From that order this appeal is brought.

The executors of the lunatic object to the creditors since the date of receivership order having this 1800*l.*; first, because the order was never perfected during the lifetime of the lunatic.

C. A. 1927

WHEATER, *In re.*

Sargant L.J.

It would have been effective if it had been drawn up and perfected as from the date when it was pronounced, but the executors say that the death of the lunatic prevented the final touch being given to the order, and caused the order itself to become inoperative. The death of the lunatic, they say, put an end to the lunacy proceedings altogether, and that the lunacy jurisdiction had ceased before the order was perfected. In my opinion, the executors are right in that contention; and although the Master since the death of the lunatic has directed that the order should be perfected, I do not think that that was a right direction, because his jurisdiction in lunacy ceased entirely at the death, and he could not turn an order in abeyance into an effective order.

Secondly, it is said that even if the order had been perfected during the lifetime of the lunatic, nevertheless the order did not give any rights to post-receivership creditors on which they were entitled to insist. The order was made simply and solely on the application of the receiver, without, I think, any other person being present. It was an order of a purely domestic character. The Court decided to grant it as a matter of what I might call domestic management, and I think that it gave no rights to the persons named in the order who were to be paid the 1800*l.*, for the Court could have rescinded or varied it at any time, and I do not think that it would have been necessary to serve the persons who were to be paid with any notice of that rescission or variation. It does not seem to me that it conferred any definite rights on these creditors. and therefore until the order was actually drawn up and put into operation the matter was as much at large as if the order had never been made at all.

I think therefore that the order asked for by the executors should be made, except that as an order for the administration of the estate has already been made the money in the hands of the receiver in Lunacy must be paid to the credit of that action. It is said that as Charles Wheater, besides being one of the executors, is also a pre-receivership creditor for a large amount, some 10,000*l.*, he ought not to be allowed any right of retainer in the character of executor, but it is

not necessary now to determine that question, which will be one to be determined in the administration action.

LAWRENCE L.J. I agree. The determination of this question, in my opinion, depends on a true appreciation of the position occupied by a receiver under the Lunacy Act. Cozens-Hardy M.R. in *In re E. G.* (1) has stated that the position of such a receiver is that of statutory agent of the lunatic. He says: "What then is the position in point of law of the quasi-committee? I think that he is a statutory agent of the lunatic who cannot himself appoint an agent. He acts on behalf of the lunatic under the statutory powers conferred upon him." If this be so, then as stated in *In re Walker* (2) the receiver's powers and duties cease with the death of the lunatic. In that case Cozens-Hardy M.R., dealing with the powers and duties of a person appointed to represent the lunatic, says: "Those cease with the death, not in the sense that he is not bound to account for receipts during the life, but in the sense that he has no right to receive anything after the death of the lunatic." Kennedy L.J. in the same case says (3): "Supposing the committee and receiver had made payments after the death of the lunatic and sought to get credit for them in passing the account. How could he discharge himself on the credit side of his account by payments which he had no jurisdiction to make because the period of his duties had come to an end?" Applying that reasoning to the present case the order of May 26, 1927 (which was, as Sargant L.J. pointed out, a purely domestic order, obtained by the receiver himself, and not at the instance of or by agreement with any of the creditors), was an order for the realization of certain assets belonging to the lunatic, the proceeds of which were to be received by the receiver, who was to apply them in payment of certain of the lunatic's debts. The lunatic died before his assets had been realized, and therefore before the receiver had received the proceeds. The death of the lunatic at once determined

(1) [1914] 1 Ch. 927, 933. (2) [1907] 2 Ch. 120, 124.
(3) [1907] 2 Ch. 125.

C. A. 1927 WHEATER, *In re.* Lawrence L.J.

the functions of the receiver and, in my opinion, operated just as if a principal had died for whom the receiver was acting as agent. After the death of the lunatic the receiver had no power to receive the proceeds of the lunatic's property nor to make any payments on his behalf to any of his creditors. In these circumstances the Master might have done one of two things, either not have drawn up the order of May 26 at all, or have rescinded the order and dealt with the costs of it. In my opinion it is clear that the Master after the lunatic's death no longer had any jurisdiction to direct or sanction any acts of the receiver other than acts relating to the accountability of the receiver for moneys received by him during the lunatic's lifetime. Counsel for the creditors put forward the suggestion that the order of May 26 operated as a charge in favour of these creditors. I do not think that that is so. This case is not like *In re E. G.* (1), where the solicitor acting for the lunatic's estate, had obtained a charge, or something equivalent to a charge for his costs, and the lunacy was still continuing. Here a purely domestic order was obtained at the instance of the receiver, which during the lifetime of the lunatic could have been discharged, altered or rescinded without the creditors having any right to protest, and which moreover was not known to the creditors before the lunatic died; such an order does not in my opinion give any charge to or confer any other right upon the creditors therein mentioned.

In the present case the order made amounted to nothing more than the giving to the receiver of certain directions as to what he should do in the future, which directions necessarily ceased to be operative on the death of the lunatic. In my judgment there is no answer to the claim of the executors to have the fund in Court transferred to them.

Appeal allowed.

Solicitors for the appellants: *W. F. Foster & Newton.*

Solicitors for the respondents: *Batchelor, Pirkis & Fry; Bulcraig & Davis.*

(1) [1914] 1 Ch. 927.

W. I. C.

GRAIGOLA MERTHYR COMPANY, LIMITED *v.* MAYOR, ALDERMEN AND BURGESSES OF SWANSEA.

C. A. 1927 Dec. 1.

[1920. G. 2270.]

Waterworks—Reservoir over Mine—Anticipated Danger of Flooding—Quia timet Action to prevent Refilling—Action dismissed—Costs—"Solicitor and Client"—Jurisdiction to award in quia timet Action—Public Authorities Protection Act, 1893 (56 *&* 57 *Vict. c.* 61), *s.* 1.

A colliery company brought an action quia timet against the corporation of a borough to restrain it from refilling and using a reservoir which had been constructed in 1879 under a special Act of Parliament and had by agreement between the parties been kept empty for a period of some years, on the ground that if it were again brought into use the mines underneath belonging to the plaintiffs would be flooded. Tomlin J. held on the evidence that there was no imminent danger of the flooding of the mines, and dismissed the action, ordering the plaintiffs to pay two-thirds of the costs as between solicitor and client under the provisions of the Public Authorities Protection Act, 1893.

On appeal by the plaintiffs as to costs :—

Held, that the Public Authorities Protection Act, 1893, s. 1, applied to an action brought quia timet against any person "for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority," and the successful defendant in the action is entitled to any costs awarded him "as between solicitor and client."

The expression "act done" in the Act does not refer only to a completed act, but is equivalent to "the doing of an act."

Harrop v. *Mayor of Ossett* [1898] 1 Ch. 525 ; *Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works* [1898] 2 Ch. 603 ; and *Grand Junction Waterworks Co.* v. *Hampton Urban Council* (1899) 63 J. P. 503 approved and followed.

Decision of Tomlin J. ante p. 31 affirmed.

Appeal from a decision of Tomlin J. (1)

The facts are fully stated in the report below, but may be shortly summarized as follows :

The defendants constructed a reservoir known as the Blaennantddu Reservoir under the Swansea Waterworks Acts, 1860 and 1873, incorporating the Waterworks Clauses Acts, 1847 and 1863. The reservoir was completed and filled in 1879, and remained in use until 1911. The plaintiffs owned two collieries worked as one, and the Graigola seam

(1) Ante p. 31.

C. A. 1927 GRAIGOLA MERTHYR CO. v. SWANSEA CORPORATION.

which they worked passed under the reservoir. The plaintiffs and defendants entered into an agreement dated September 23, 1912, under which the defendant corporation, in order to permit the working by the plaintiffs of the minerals underlying the reservoir, agreed to discontinue its use and keep it empty for a period of three years from the date when the plaintiffs should have completely worked and gotten the minerals, as provided by the agreement. The reservoir was emptied in July, 1911, and had not since been refilled or brought into use. The minerals were completely worked out by February 1, 1917, and nothing was done during the next three years. Some time after February 1, 1920, the defendants wrote expressing their intention of refilling the reservoir. The plaintiffs protested, alleged that the refilling would necessarily involve the flooding of their mines, and as the defendants adhered to their intention, on October 6, 1920, commenced a quia timet action asking for an injunction to restrain the defendants from letting water into the reservoir, so as to damage the collieries and mines of the plaintiffs under and adjacent to the reservoir.

The action came on for trial in November, 1926, and after a hearing lasting for sixty days Tomlin J. reserved judgment. On May 31, 1927, he delivered judgment dismissing the action with costs, ordering the plaintiffs to pay two-thirds of the defendants' costs of the action between solicitor and client.

On July 29 the plaintiffs moved to vary the order by omitting the words "as between solicitor and client," on the ground that the Public Authorities Protection Act, 1893, s. 1, did not apply to a quia timet action to restrain an act threatened to be done, but only to actions in respect of acts already done and complete. Tomlin J. dismissed the application with costs.

The plaintiffs appealed on the question of costs.

Upjohn K.C. and *A. T. James* for the appellants. The Public Authorities Protection Act, 1893, does not in terms apply to a quia timet action at all. It is true that orders have been made in quia timet actions where the Act was set up as a defence, to pay costs as between solicitor and client,

but the point has not been taken and definitely decided before. The Act has no application to a case where no act has been done, and no neglect or default has been committed. Here the defendants only threatened, by letter, to refill their reservoir, but they took no further step. The letter cannot be treated as an "act." The period of limitation imposed by the Act is six months from the date when the "act" complained of is "done," and not six months from the date of any resulting damage from the Act. *Freeborn* v. *Leeming* (1); *Carey* v. *Metropolitan Borough of Bermondsey* (2); *Holford* v. *Acton Urban Council* (3); *Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works* (4); *Grand Junction Waterworks Co.* v. *Hampton Urban Council.* (5)

The first case is not an authority upon the question of costs, the second and third were not really quia timet actions; acts complained of had been done and money expended at the date of the issue of the writ. The only case where such an order was made in a quia timet action is *Harrop* v. *Mayor of Ossett.* (6)

A quia timet action is based on the theory of an irreparable injury taking place if the act intended and threatened is done. The Public Authorities Protection Act, 1893, is based on a completed act only. Here there was no act done and no suggestion of negligence. The reservoir had been filled and used for some years, then as the plaintiff company's workings came underneath it, it was emptied, and remained unfilled.

Sir Leslie Scott K.C. and *Valentine Holmes* for the respondents. The point now raised was decided by the House of Lords in *Fielden* v. *Morley Corporation.* (7)

The decision of the Court of Appeal was only given after the full Court had been consulted, when it was held that the defendants were entitled to costs as between solicitor and client.

The point was specifically raised and decided on the authority of *Harrop* v. *Mayor of Ossett.* (6) The word "action" in the

(1) [1926] 1 K. B. 160.
(2) (1903) 67 J. P. 447.
(3) [1898] 2 Ch. 240.
(4) [1898] 2 Ch. 603, 609.
(5) [1898] 2 Ch. 331.
(6) [1898] 1 Ch. 525.
(7) [1900] A. C. 133, affirming [1899] 1 Ch. 1, reported as *Fielding* v. *Morley Corporation.*

C. A. 1927 — GRAIGOLA MERTHYR CO. v. SWANSEA CORPORATION.

Act covers every kind of action in the Chancery Courts, and it would be wrong to exclude a quia timet action from the general rule.

It is admitted that if the corporation had let a few gallons of water only into the reservoir, the Act would have applied, and the judgment would have carried solicitor and client costs.

The word " done " in the Act has no temporal meaning ; it includes " about to be done " as well as " having been done." It does not merely refer to an act already done and completed. The real contrast is between acts done, and acts omitted to be done.

But whether the case can be brought under the words in sub-clause (*a*), at any rate it comes under (*b*). Damages may be awarded in lieu of an injunction in case of a threatened injury: *Leeds Industrial Co-operative Society* v. *Slack* (1), per Viscount Finlay, at p. 859. See Chancery Procedure Amendment Act, 1858 (Lord Cairns' Act) (21 & 22 Vict. c. 27), and the Waterworks Clauses Act, 1847, s. 27.

It is the only principle of interpretation which will bring the past participle " done " into consonance with the general scheme of the Act.

[LORD HANWORTH M.R. The act of writing a letter is one thing ; the subject or the fact of which the letter gives notice is another. Can you say the letter is an act ?]

Any act done for the purpose of carrying out the supposed statutory duty and which leads the other party to suppose there is danger, founds the jurisdiction.

Upjohn K.C. in reply. The argument in *Harrop* v. *Mayor of Ossett* (2) was that the Act did not apply to Chancery proceedings, and was not directed to the point that it did not apply to quia timet actions, and that was the argument which was before the Court of Appeal in *Fielden* v. *Morley Corporation.* (3) That was not a quia timet action, and the present point was not before the Court in that case. The word " done " must be given a temporal sense in the Act,

(1) [1924] A. C. 851, 859.
(2) [1898] 1 Ch. 525.
(3) [1899] 1 Ch. 1, sub nom. *Fielding* v. *Morley Corporation.*

in accordance with its scheme. To bring a case within the Act everything turns on the date when the act is done or the neglect occurs. It is a Statute of Limitations.

The Act is very burdensome, and should be strictly construed. So construed the plaintiffs do not come within it.

Cur. adv. vult.

Dec. 1. LORD HANWORTH M.R. By the Swansea Waterworks Act, 1860, and other Acts of Parliament, the defendants, who are now the urban sanitary authority for the district, became entitled to make and maintain and use a reservoir known as the Blaennantddu Reservoir. This reservoir was made and filled with water; but on September 29, 1912, the defendants entered into an agreement with the plaintiffs, who are the owners of mines and minerals which lie under the reservoir, to empty the reservoir and discontinue its use for the storage of water for a term of three years, from a date fixed under the said agreement. The defendants accordingly emptied the reservoir, and it has not since been used for the storage of water. The statement of claim sets out:

"13. On the 12th January, 1920, the company received a letter from the said Town Clerk stating that the Corporation intended to refill the reservoir and the Corporation was thereupon informed that the company objected to such refilling as being (as it would in fact be) dangerous to the company's collieries."

On October 26, 1920, the writ was issued, and paras. 24 and 25 of the statement of claim were as follows:

"24. By reason of the premises and, in fact, water collected or stored or caused or permitted to remain in the reservoir will break through and penetrate into the workings and worked out spaces in the Graigola Merthyr Colliery under and near the reservoir, and fill up, drown, destroy, and render unworkable, both the said collieries of the company and cause to the company irreparable damage."

"25. The Corporation threaten and intend forthwith to fill up or attempt to fill up the reservoir with water and unless they are restrained from so doing by the order and

C. A. 1927

GRAIGOLA MERTHYR CO. v. SWANSEA CORPORATION.

Lord Hanworth M.R.

injunction of the Court the company will suffer damage as aforesaid."

The plaintiffs claimed: "An injunction to restrain the defendant Corporation their agents servants and workmen from filling or causing to be filled or permitting to remain filled with water the said reservoir so as to be a nuisance or cause of damage to the collieries mines and works of the plaintiff company under and adjacent to the said reservoir."

In their defence the defendants denied that the refilling of the reservoir would be dangerous to the collieries of the plaintiffs. Para. 24 was also denied, and the defendants made an offer to refill the reservoir gradually and experimentally.

The action was tried by Tomlin J., who dismissed it, prefacing his judgment with the words: "the Court not being satisfied, upon the evidence adduced, that the filling of the reservoir will cause a sudden inundation of the plaintiffs' mines as alleged by the plaintiffs."

Counsel for the plaintiffs do not dispute that the act threatened to be done and sought to be restrained was in execution of an Act of Parliament. Upon that basis an application was made to Tomlin J. for an order under s. 1 (*b*) of the Public Authorities Protection Act, 1893, which runs as follows: "Wherever in any such action a judgment is obtained by defendant, it shall carry costs to be taxed as between solicitor and client." Tomlin J., after argument upon a motion to vary the minutes of his judgment, by omitting the words "as between solicitor and client," confirmed his order that the plaintiffs pay to the defendants two-thirds of their costs of this action to be taxed as between solicitor and client and also of the motion to vary the minutes of the order. From that refusal to vary his order the plaintiffs appeal. They claim that the section above quoted does not apply, because it is only applicable to such actions as are comprised within s. 1 of the Act; that is to say, where an action is commenced "for any act done in pursuance or execution or intended execution of any Act of Parliament"; and that sub-s. (*a*) imposes a time limit to bringing an action founded upon such an act, as illustrated by *Freeborn* v.

Leeming. (1) They argue that the present action is quia timet, before any act has been done, and was instituted by the plaintiffs to prevent any act being done in execution of the Acts of Parliament referred to which would have caused injury, and thus there was no act done within the section which demands that there should be an act from which time may be calculated.

There is no doubt that orders for costs as between solicitor and client have been made in quia timet actions. Thus in *Harrop* v. *Mayor of Ossett* (2) such an order was made where the claim was for an injunction quia timet. So also in *Toms* v. *Clacton Urban Council* (3), and apparently in *Holford* v. *Acton Urban Council* (4), and in *Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works.* (5) That is a decision of the Court of Appeal, but the point now taken does not appear to have been argued. In *Grand Junction Waterworks Co.* v. *Hampton Urban Council* (6) Stirling J. made an order for costs as between solicitor and client in a quia timet action, and he rejected the argument that because the plaintiffs claimed a declaration simply and the action was not brought for some act of the defendants, the power to order such costs did not apply. "So to decide would be shutting one's eyes to the facts of the case. The action was not brought to decide an abstract question but to ascertain whether the defendants would be right or wrong if they carried out their threats and took proceedings before the proper tribunal, as they had threatened to do." This reasoning appears to me to be correct. A quia timet action is not based upon hypothetical facts for the decision of an abstract question. When the Court has before it evidence sufficient to establish that an injury will be done if there is no intervention by the Court—it will act at once, and protect the rights of the party who is in fear, and thus supply the need of what has been termed protective justice. It is a very old principle. Sir E. Coke, 2nd Institute, p. 299, says

(1) [1926] 1 K. B. 160.
(2) [1898] 1 Ch. 525.
(3) (1898) 62 J. P. 505.
(4) [1898] 2 Ch. 240.
(5) [1898] 2 Ch. 609.
(6) 63 J. P. 503; 15 Times L. R. 412.

C. A. 1927 GRAIGOLA MERTHYR CO. v. SWANSEA CORPORATION. Lord Hanworth M.R.

that "preventing justice excelleth punishing justice," and quotes Bracton's advice: "Et hoc faciat tempestive, ne per negligentiam damnum incurrat, quia melius est in tempore occurrere quam post causam vulneratam remedium quaerere."

In the smallpox hospital case, *Attorney-General* v. *Manchester Corporation* (1), Chitty J. said that where it is certain that injury will arise, the Court will at once interfere by injunction; and called attention to the words of Lord Eldon in *Crowder* v. *Tinkler* (2): "extreme probability of irreparable injury"; and of Lord Brougham in *Earl of Ripon* v. *Hobart* (3): "Proceeding upon practical views of human affairs, the law will guard against risks which are so imminent that no prudent person would incur them, although they do not amount to absolute certainty of damage." See also Mitford on Pleading, 5th ed., pp. 171–2. From these authorities it appears that the action of the Court in a quia timet action is one rather of procedure when it has become seised of facts which require its intervention. It takes the facts as they must appear to practical men; but it does require facts, and not mere suggestion. In the present case, therefore, upon the pleadings to which I have referred, it appears to me that the foundation of the action was the acts of the corporation which would be done under their statutory powers. They were regarded by the plaintiffs as acts no longer contingent but imminent, and which forced them to found an action, and to bring these facts to the attention of the Court and require assistance from it.

It is true that in *Fielden* v. *Morley Corporation* (4), where it was held that the statute does not apply to appeals, Lindley M.R. entered a caveat as to what acts do come within the statute. That case, however, does not in my judgment modify the observations which I have ventured to make above, as to the basis on which the Court was invited to act in the present case. In any view, it appears to me that it would be too narrow an interpretation of this remedial statute to cut down the meaning of the words "act done" to an act which had

(1) [1893] 2 Ch. 87, 91.
(2) (1816) 19 Ves. 617, 622.
(3) (1834) 3 Myl. & K. 169, 176.
(4) [1899] 1 Ch. 1; [1900] A. C. 133.

been completed. The threat to proceed under the act is sufficient. I agree with the view of Romer J. in *Harrop* v. *Mayor of Ossett* (1) that there is no reason for limiting the scope of the section in a narrow sense.

In my judgment, the order made in the *Southwark and Vauxhall Water Company's* case (2), affirmed in the Court of Appeal, where the Board of Works were about to lower the surface of the street, was a right order. Where the section applies it is directory and, therefore, in my judgment the order of Tomlin J. was right. The appeal must be dismissed with costs as between party and party.

SARGANT L.J. I agree that this appeal should be dismissed, and am content to adopt as my own the judgment on this point of Tomlin J. His reasoning has not, in my opinion, been displaced or substantially affected by the criticisms of counsel for the defendants.

LAWRENCE L.J. This appeal raised a question of general importance—namely, whether a quia timet action for an injunction comes within s. 1 of the Public Authorities Protection Act, 1893, so as to entitle the public authority to solicitor and client costs as against an unsuccessful plaintiff.

In the present case the act sought to be restrained by injunction was an act which the defendants were intending to do in the execution of their statutory powers and duties as the local sanitary authority for the district and borough of Swansea.

On behalf of the appellants it was contended that s. 1 of the Act only applies to actions for completed acts and completed neglects or defaults, and that the present action does not come within the section, because it is an action to prevent the defendants from doing an act and not an action for an act already done by them.

In *Fielden* v. *Morley Corporation* (3) it was held that the section applied to actions for injunctions in the Chancery

(1) [1898] 1 Ch. 525, 527.
(2) [1898] 2 Ch. 609.
(3) [1899] 1 Ch. 1; [1900] A. C. 133.

C. A. 1927 GRAIGOLA MERTHYR CO. v. SWANSEA CORPORATION. Lawrence L.J.

Division, and Lindley M.R. in delivering the judgment of the Court, after quoting the title of the Act, stated that the key to the enactment was that it was intended, as the title showed, to protect public bodies from expense when they were unsuccessfully sued in respect of acts done or omitted to be done in the exercise of statutory powers or duties. In that case the action was brought to restrain the overflow of water on to the plaintiff's land, but in the judgment there is no hint of a distinction between quia timet and other actions for an injunction.

The principle upon which that case was decided, in my opinion, applies as much to actions for an injunction to restrain an act threatened to be done by a public body in the exercise of statutory powers or duties as to actions for an injunction to restrain the repetition of an act which had already been done by such a body in exercise of such powers or duties. In the latter case, as well as in the former, the injunction sought is an injunction to restrain future acts. The only difference between the two cases is that in a purely quia timet action the burden of proof resting on the plaintiff is far heavier than in an action where an act has already been done and has already caused actual damage. In both cases, however, the issue is the same—namely, whether the act (completed or intended) is an act causing substantial damage to the plaintiff. It would be strange if the protection afforded by the Act to public bodies were to depend upon the precise moment when an action was commenced and that if the plaintiff should happen to issue his writ before the act was done the public body would lose the protection afforded by the Act, but if the plaintiff were to delay the issue of the writ until after the act had been done, the public body would have that protection. In the present case Mr. Upjohn had to admit that if the defendants had actually commenced filling their reservoir, instead of first giving to the plaintiff notice of their intention to fill it, he could not have contended that this action would not have fallen within the section.

In at least two of the cases cited during the argument it was held that the local authority was entitled to solicitor

and client costs on the dismissal of a purely quia timet action for an injunction—namely, *Harrop* v. *Mayor of Ossett* (1) and *Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works*. (2) In the former case Romer J., and in the latter case the Court of Appeal (after having reserved judgment), dismissed the action and ordered the plaintiff to pay the defendants' costs as between solicitor and client. So far as appears the point taken by Mr. Upjohn on the present occasion, was not taken by counsel in either of these cases, but it is not, therefore, to be assumed that in making the orders the Court was unmindful of the fact that the actions were purely quia timet actions. Although these cases were decided upwards of twenty-five years ago, I am not aware of any case until the present in which it has been suggested that the orders made in these two cases were wrong.

To hold that the operation of the section is limited to actions for an injunction where some act has already been done would, in my opinion, be placing a construction on the language of the section which is too narrow and contrary to the principle upon which *Fielden* v. *Morley Corporation* (3) was decided. The appellants' contention rests mainly on the use of the past tense in the expression "any act done." Having regard to the collocation in which that expression occurs I think that the appellants are attributing far too much weight to the past participle "done." The section deals with actions for acts and for omissions, both of a limited kind—namely, acts and omissions in the exercise of some statutory authority or duty, and, in separating acts from omissions and appending the necessary qualification to each, the use of the word "done" is not unnatural in the case of acts as distinguished from omissions, such word not being there used in an essentially temporal signification. In my opinion the expression "for any act done" in the section bears much the same meaning as the expression "for doing any act" and does not operate to exclude quia timet actions for threatened acts.

Mr. Upjohn relied upon cl. (*a*) of the section, which, as

(1) [1898] 1 Ch. 525. (2) [1898] 2 Ch. 603.
(3) [1899] 1 Ch. 1; [1900] A. C. 133.

C. A. 1927 GRAIGOLA MERTHYR CO. v. SWANSEA CORPORATION. Lawrence L.J.

he rightly pointed out, has been strictly construed by the Courts (see, for example, *Freeborn* v. *Leeming* (1)), as showing that quia timet actions cannot properly be held to fall within the scope of the section. In my opinion this clause does not support his contention. Clause (*a*) imposes a time limit after the expiration of which no action will lie: actions for an injunction brought before the act complained of is done are not within the mischief aimed at by the clause and such actions are not, in my opinion, purported to be prohibited by that clause. The real meaning of that clause is that no action shall lie unless it is commenced *at the latest* before the expiration of six months next after the act or omission complained of. This construction in no way touches or affects the decisions of the Court in cases like *Freeborn* v. *Leeming*. (1)

In the result I have come to the conclusion that the present action is in substance an action for an act done in execution of a statutory power or duty within the meaning of the section. I am fortified in this view by the fact that it accords not only with the decisions in the cases which I have referred to but also with the view expressed by Stirling J. in *Grand Junction Waterworks Co.* v. *Hampton Urban Council* (2), where that learned judge held that an action for a declaration brought for the purpose of testing the legality of an act threatened to be done by the local authority if the plaintiffs continued the erection of certain buildings, was an action falling within the provisions of the section, and ordered the plaintiffs to pay costs as between solicitor and client.

For the reasons stated I think that the appeal fails and should be dismissed with costs.

Appeal dismissed.

Solicitors: *Beamish, Hanson, Airy & Co., for Gwilym James, Llewellyn & Co., Merthyr Tydfil; Peter Thomas & Clark, for H. L. Lang-Coath, Town Clerk, Swansea.*

(1) [1926] 1 K. B. 160. (2) 15 Times L. R. 412; 63 J. P. 503.

H. L. L.

In re PARKER'S SETTLED ESTATES.

PARKER *v.* PARKER.

[1927. P. 1238.]

ROMER J.

1927

Nov. 9, 10, 11, 17; *Dec.* 8.

Settled Land—Trust for Sale—Meaning of "immediate binding trust for sale"—Overreaching of prior equitable Interests—Compound settlement—Interpretation of "trust for sale"—Tenant for life—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *ss.* 1, *sub-ss.* 1 (*i.*), 7, 20, *sub-s.* 1 (*viii.*)—*Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 2, *sub-s.* 2.

Where before January 1, 1926, land had been settled on A. for life with remainder to his first son in tail, and A. has charged the land with portions for his younger children, and appointed a term of years to trustees to secure the portions, although the son has disentailed and A. and the son have conveyed the land to trustees on trust for sale, but in such circumstances that the portions term does not become merged in the inheritance, the land remains settled land notwithstanding s. 1, sub-s. 7, of the Settled Land Act, 1925 (as amended by the Law of Property Act, 1926).

The words "trust for sale," when used with reference to land subject to prior equitable interests, are not confined to cases where the trustees for sale can overreach the equitable interests.

The word "binding" in the statutory definition of "trust for sale" does not exclude a "trust for sale" as usually understood.

Under the will of a testator who died in 1888 an estate was settled on A. for life, with remainder to his first and other sons in tail, with power to A. to jointure and charge portions. In 1901 A., on his marriage, appointed by deed a jointure rent-charge to his wife, if she survived him, without power of anticipation, and, subject thereto, he charged the land with payment of certain portions to the younger children of the marriage, and limited to trustees a term of 1000 years from his death to support the portions charge. There was one younger child only, and he was an infant on January 1, 1926. A.'s elder son B. disentailed in 1924, and two further deeds were executed in that year. By one, A. and B. and A.'s wife (notwithstanding her restraint on anticipation) and the trustees of the portions term (who had no power to release their term) conveyed the land to trustees on trust at A.'s request to sell the same. The trusts of the proceeds of sale were declared by a second deed, the income being payable during A.'s life in each year, as to the first 500*l.* to A., as to the surplus up to a specified sum to B., and as to the balance to A. Provision was also made for A.'s wife and the younger children:—

Held, (1.) that, notwithstanding the trust for sale, on the coming into operation of the Law of Property Act, 1925, and the Settled Land Act, 1925, the land was settled land under a compound settlement constituted by the will, the deed of 1901, and the three deeds of 1924; (2.) that A.

ROMER J.

1927

PARKER'S SETTLED ESTATES, *In re.*

PARKER *v.* PARKER.

was the sole tenant for life; (3.) that so long as the land remained so settled no order appointing or approving the trustees for sale would affect the position.

The interpretation of the phrase "immediate binding trust for sale" adopted by Tomlin J. in *In re Leigh's Settled Estates* (1926) Ch. 852 and *In re Leigh's Settled Estates* (No. 2) (1927) 2 Ch. 13 not followed.

THE following facts are taken from the judgment.

By the will of the plaintiff's father, who died in 1888, certain lands at Ware in the county of Hertford were devised, in the events which happened, to the use of the plaintiff during his life, with remainder to the use of his first and every other son successively according to seniority in tail, with certain remainders over. By deed, dated November 12, 1901, executed on the occasion of the marriage of the plaintiff, and made between the plaintiff of the first part, his wife of the second part, and certain trustees of the third part, the plaintiff, in exercise of powers in that behalf given to him by the will, appointed to his wife as her separate property, without power of anticipation during her life in case she should survive him, a yearly rent of 400*l.* by way of jointure to be charged on such lands, and he charged the lands, subject to the jointure rent-charge, with payment to the younger child or children of the intended marriage of certain portions, and for the purpose of securing such portions he appointed the land to the trustees for a term of 1000 years commencing from his death. The plaintiff's wife was still living, and there had been issue of her marriage with the plaintiff, two sons, both of whom had attained the age of twenty-one years.

On September 28, 1924, the elder of those two sons, with the consent of the plaintiff as the protector of the settlement, disentailed, with the result that, subject to the plaintiff's life interest and his mother's jointure and his younger brother's portion, he became entitled to the land in fee simple.

On September 29, 1924, two documents were executed. By the first one, which was made between the plaintiff of the first part, his elder son of the second part, his wife of the third part, the then trustees of the deed of November, 1901, of the fourth part, and certain persons therein called "the trustees" of the fifth part, the plaintiff and his elder son,

according to their respective interests, conveyed, and the wife, as the owner of the jointure rent-charge, purported thereby to release and confirm to the trustees all the lands devised by the will of the testator then remaining unsold to the trustees in fee simple, and the trustees of the 1000 years term purported (although they had no express power under the deed of 1901) to surrender and assign the said lands to the trustees to the intent that the same should be thenceforth discharged from the portions charged by the indenture of 1901, and that the said term of 1000 years thereby limited should be absolutely merged and extinguished in the freehold and inheritance thereof. By the same indenture it was declared that the trustees should stand seised of the said lands thereby conveyed upon trust, at the request in writing of the plaintiff during his life and afterwards at the discretion of the trustees, to sell the same, and that the trustees should stand possessed of the net proceeds of sale and of the rents and profits of the lands, upon the trusts and subject to the powers and provisions declared and contained in and by the other indenture of September 29, 1924. By that other indenture, which was made between the plaintiff of the first part, the elder son of the second part, and the trustees of the third part, it was in effect, and as I construe the document, declared that the trustees should hold the proceeds of sale upon trust during the joint lives of the plaintiff and his elder son to pay out of the income, in the first place, the sum of 500*l.* per annum to the plaintiff, and in the next place the sum of 300*l.* per annum (liable to increase or diminution as therein mentioned) to the elder son, and subject thereto upon trust to pay the income to the plaintiff during his life. The trusts, after the death of the plaintiff, were in effect to raise the portions sum under the deed of 1901, and then out of the income of the residue to pay to the plaintiff's wife should she survive him 600*l.* per annum during her life in substitution for her jointure of 400*l.* per annum under the deed of 1901, and to pay the balance of the income to the elder son during his life and after his death to hold the capital

ROMER, J.
1927
PARKER'S SETTLED ESTATES, *In re.* PARKER *v.* PARKER.

for his children and issue as therein mentioned, and, in default of such children and issue, for the younger son and his issue as therein mentioned. Pending a sale the net rents and profits of the lands were to be paid to the persons, and for the purpose to and for which the income of the proceeds of sale would be payable or applicable.

Under these circumstances, the plaintiff took out this summons, and it asked: (1.) That it might be determined whether the lands were lands subject to a trust for sale within the meaning of s. 2, sub-s. 2, of the Law of Property Act, 1925 (as amended by the Law of Property (Amendment) Act, 1926 (16 & 17 Geo. 5, c. 11)), any equitable interest or power, having priority to which trust for sale, was (under the sub-section) capable of being overreached by the exercise or execution of such trust for sale by trustees approved or appointed by the Court; (2.) If the answer to question 1 should be in the affirmative, then that it might be determined whether the jointure and portions sum charged by the indenture of November 12, 1901, and the term of 1000 years supporting the same thereby limited, were equitable interests capable of being overreached under sub-s. 2; (3.) If the answers to questions 1 and 2 should be in the affirmative, then that the plaintiff and the defendants, the trustees of the indenture of November 12, 1901, on trust for sale and of the indenture of settlement of even date therewith might (under sub-s. 2, as amended) be approved as the trustees from exercising or executing the trust for sale by the indenture of conveyance on trust for sale declared; (4.) If the answer to question 2 be in the negative then that it might be determined whether the land was settled land within the meaning of the Settled Land Act, 1925 (as amended by the Law of Property Act, 1926), now standing settled under a compound settlement consisting of (*a*) the will; (*b*) the indenture of November 12, 1901; (*c*) the disentailing assurance of September 28, 1924; (*d*) the indenture of conveyance on trust for sale of September 29, 1924; and (*e*) the indenture of settlement of September 29, 1924, or a compound settlement consisting of the will and any, and, if so, which of the instruments

respectively; (5.) If it should be determined that the land was settled land, then whether the plaintiff alone, or the plaintiff and the defendant, J. W. Parker (the plaintiff's elder son), together was or were the person or persons having the powers of a tenant for life under the Settled Land Act, 1925, and in whose favour the vesting deed or deeds ought to be made; (6.) If it should be determined that the land was settled land, then whether in the event of an order being made, while the land remained settled land, approving or appointing (within the meaning of s. 2, sub-s. 2) the plaintiff and the trustees of the indenture of conveyance on trust for sale of September 29, 1924, and the indenture of settlement of the same date, the land thereupon ceased to be settled land.

Nicholson Combe for the plaintiff. The joint effect of the three deeds of 1924 was to vest in the trustees of the conveyance of 1924 the legal estate in fee simple, subject to the jointure and the portions term. The jointress' joinder in that deed was a nullity, because by no device can a married woman deprive herself of the protection of the restraint on anticipation: see Lindley M.R. in *Lady Bateman* v. *Faber*. (1) The purported extinguishment of the portions term by the term trustees was not effective as against the infant portioner, either at law or in equity. All parties had notice of the equity. There would be no merger at law if there was none in equity. The conveyance of 1924 and the deed settling the proceeds of sale did not create a settlement by trust for sale of the fee simple subject to the jointure and term, under s. 63 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), because the trust for sale only arose on the plaintiff's request to sell: *In re Goodall's Settlement*. (2) But there was a settlement under the main provisions of the Act of 1882, consisting of the will, the deed of 1901, and the three deeds of 1924, and the plaintiff being entitled to the income until sale was a person having the powers of a tenant for life under s. 58, sub-s. 1 (ix.), of that Act: *In re Goodall's Settlement* (2);

(1) [1898] 1 Ch. 144, 149. (2) [1909] 1 Ch. 440.

ROMER J. 1927 PARKER'S SETTLED ESTATES, *In re.* PARKER *v.* PARKER.

In re Mundy and Roper's Contract. (1) The subject-matter of that settlement was the entire fee simple. The subject-matter of the trust for sale here was the fee simple subject to the jointure and term, the purported dispositions of 1924, having in part failed to be effective. The plaintiff and the former tenant in tail stand by their dispositions of 1924, notwithstanding that partial failure.

The questions as to the effect of the Acts of 1925 on that position could be readily solved but for the interpretation placed by Tomlin J. in *In re Leigh's Settled Estates* (2), in *In re Leigh's Settled Estates* (*No.* 2) (3), and in *In re Lindsley's Estate* (4), on the definition of trust for sale contained in s. 117, sub-s. 1 (xxx.), of the Settled Land Act, 1925, and s. 205, sub-s. 1 (xxix.), of the Law of Property Act, 1925. But that interpretation is not consistent with the judgments of Lord Hanworth M.R. and Sargant L.J. in *In re Ryder and Steadman's Contract.* (5) The true view turns on the double definition of "land" in both s. 117, sub-s. 1 (ix.), of the Settled Land Act, 1925, and s. 205, sub-s. 1 (ix.), of the Law of Property Act, 1925. "Land" has in those statutory definitions a physical and a non-physical meaning. It may signify the earth in the physical sense, or an estate or interest in the non-physical sense. Consequently the same earth may be subject at the same time to many trusts for sale and to many settlements. Sect. 1, sub-s. 7, of the Settled Land Act, as amended by the Law of Property Act, 1926, uses "land" in the non-physical sense, so that the same estate or interest in land cannot be at the same time subject to a trust for sale and to a settlement. But there is nothing in either of those Acts of 1925 to prevent the whole subject-matter of a trust for sale from being only a component part of the greater entire subject-matter of a settlement, whether that settlement be a simple or a compound settlement. "Binding" in the statutory definition of trust for sale only means capable of effective exercise as to the whole

(1) [1899] 1 Ch. 275.
(2) [1926] Ch. 852.
(3) [1927] 2 Ch. 13.
(4) (1927) 63 L. J. Newsp. 375.
(5) [1927] 2 Ch. 62.

subject-matter of the trust. The word is used in the sense of "effective" in the Infant Settlements Act, 1855 (18 & 19 Vict. c. 43), an Act referred to in s. 27, sub-s. 3, of the Settled Land Act, 1925. The interpretation of "trust for sale" adopted by Tomlin J. in the *In re Leigh* cases (1), that trustees holding a legal estate subject to prior interests do not hold it on trust for sale unless and until they can overreach those prior interests, involves very serious results; particularly because the overreaching power might arise by accident on some order being made in relation to the trustees for some other purpose. But overreaching is a matter entirely distinct from the question of the subsistence of a trust for sale. The overreaching occasions are collected in s. 2, sub-s. 1, of the Law of Property Act, 1925. The direct conflict in terms in sub-s. 2 (as amended), which faced Tomlin J. in postulating his interpretation, would not exist if the true view be adopted. The statutory trusts defined by s. 35 of the Law of Property Act, 1925 (as amended), are trusts for sale. Yet the Court of Appeal in *Ryder and Steadman's* case (2) recognized the subsistence of a trust for sale where prior interests could not be overreached by the trustees. The interpretation of Tomlin J. cannot therefore now stand. The effect in this case of the Acts of 1925 is that the legal estate in the fee simple, subject to the jointure and term, has been divested out of the trustees of the conveyance of 1924, and has vested in the plaintiff as tenant for life under clauses 3, 5 and 6 (*c*) of Part II. of Sch. I. to the Law of Property Act, 1925. The compound settlement, consisting of the will, the deed of 1901, and the three deeds of 1924, continued on foot under s. 1, sub-s. 1 (v.), of the Settled Land Act, 1925, as also did the jointure and term as interests comprised in that settlement; the trust for sale on request was converted (under s. 117, sub-s. 1 (xxx.), of the Settled Land Act, 1925, and s. 205, sub-s. 1 (xxix.), of the Law of Property Act, 1925) into an immediate binding trust for sale, but only as regards the equitable interest in the same subject-matter as previously. Sect. 1, sub-s. 7, of

(1) [1926] Ch. 852; [1927] 2 Ch. 13. (2) [1927] 2 Ch. 62.

ROMER J.
1927
PARKER'S SETTLED ESTATES, *In re.*
PARKER *v.* PARKER.

the Settled Land Act, 1925 (as amended), did not prevent those results, inasmuch as the subject-matter of the trust for sale was only a component part of the greater subject-matter of that compound settlement. The plaintiff is the sole tenant for life, as he takes the balance of the income under the compound settlement after his son has participated to a specific figure: *In re Leigh's Settled Estates.* (1) While the land remains settled land under the compound settlement no order appointing trustees of the conveyance of 1924 would affect the position. The trustees have no legal estate, and s. 2, sub-s. 2 (as amended), of the Law of Property Act, 1925, presupposes that the legal estate is vested in the trustees on their conveying the land. If the Court disapproves the interpretation of trust for sale adopted in the *In re Leigh* cases (2) the title will be protected against questions of defeasance, which would otherwise arise on any order being made hereafter in relation to the trustees for sale.

Guest Mathews for the trustees for sale. There was a perfectly good trust for sale ab initio, but if that is not so, then a good trust for sale would arise on the trustees being appointed as contemplated in s. 2 of the Law of Property Act, 1925. It would be absurd if the validity of a trust for sale depended on whether the trustees happened to be a trust corporation and not individuals. Sect. 2, sub-s. 2 (*a*), does not affect the validity of a trust for sale, but only the question whether certain interests and powers can be over-reached upon a sale by the trustees. If the word "binding" has any particular meaning it means "now binding" upon the persons in whom the legal estate is vested. In the Settled Land Act, 1925, "land" and "legal estate" are in many instances used as synonymous terms: see s. 21. Once it is found that there is a trust for sale presently binding upon the persons in whom the legal estate is vested, the land is taken altogether out of the Settled Land Act, otherwise the question as to whether land is settled land would depend upon whether the trustees happened to be a trust corporation or mere individuals; the trust for sale mentioned in s. 1,

(1) [1926] Ch. 852. (2) [1926] Ch. 852; [1927] 2 Ch. 13.

sub-s. 7 (as amended), ss. 3 and 20, sub-s. 1 (viii.), of the Settled Land Act, 1925, ought not to be construed in any restricted manner, otherwise great confusion will arise. If Tomlin J. is right in *In re Leigh's Settled Estates* (1) there can never be a binding trust for sale, unless the subject of the trust for sale is the unincumbered fee simple. The estates and interests which trustees for sale can overreach under s. 2, sub-s. 2 (*a*), of the Law of Property Act, 1925, are identical with those which under s. 21 of the Settled Land Act, 1925, can be overreached by the person having the powers of a tenant for life under that section. In both cases the land is sold free from certain charges, but subject to others. Under s. 72 of the Settled Land Act, 1925, a full tenant for life can overreach more estates and charges than a person only having the powers of a tenant for life under s. 21, or the trustees for sale. Land is held upon trust for sale, nothwithstanding that there may be a legal or equitable charge subsisting in priority to the trust for sale.

Walter Banks for the trustees of the settlement. The will trustees claim to be trustees of a compound settlement that was subsisting at the date when the Settled Land Act, 1925, came into force. The definition of a settlement includes a settlement created by the Act. This settlement must continue until all prior charges have ceased, unless the land is held upon trust for sale within the meaning of s. 1, sub-s. 7 (as amended), of the Settled Land Act, 1925. In these Acts a clear distinction is made between two different methods of settling land—namely, (1.) settlements governed by the Settled Land Act, 1925, and (2.) trusts for sale in which the land is converted into personal estate.

Nicholson Combe in reply.

Cur. adv. vult.

Dec. 8. ROMER J. It will be observed that inasmuch as the wife was restrained from anticipation, the first indenture of September 29, 1924, was inoperative to release the land from her jointure. The trustees of the portions term moreover

(1) [1926] Ch. 852.

ROMER J. 1927 PARKER'S SETTLED ESTATES, *In re.* PARKER *v.* PARKER.

had no power to surrender or assign the lands discharged from the portions and to merge the term of 1000 years in the freehold. That term would not, therefore, have been treated as merged in equity, and was not therefore merged in law. In these circumstances it might have been open to the plaintiff and his elder son to claim that the consideration for their joining in the deeds had failed. They have not however taken up this attitude, but desire that the deeds should operate upon their own interests. What in that case may be the trusts affecting the proceeds of sale declared by the second indenture after the death of the plaintiff it is difficult to say. But in these circumstances I cannot regard the trusts declared by the first deed as being anything more than a trust to sell the interests of the plaintiff and his elder son, subject to the jointure rent-charge and the portions term.

The result therefore was that the legal estate in fee simple in the land was vested in the trustees upon trust to sell, but subject to the wife's jointure rent-charge, which was not yet an interest in possession, and subject to the portions term to secure portions not yet raisable. The land was accordingly the subject of a compound settlement consisting of the will, the deed of 1901, the disentailing deed and the two deeds of September 29, 1924: *In re Mundy and Roper's Contract.* (1) Under this settlement the plaintiff had, by virtue of s. 58, sub-s. 1 (ix.), of the Settled Land Act, 1882, the powers of a tenant for life, though, so far as the two indentures of September 29, 1924, were concerned, inasmuch as the only interests in the land affected by them were subject to an immediate trust for sale, the plaintiff would only be deemed to be tenant for life of the settlement of those interests deemed to exist by virtue of s. 63 of that Act. This was the state of affairs when the Settled Land Act, 1925, and the Law of Property Act, 1925, came into force, and the object of this summons is to ascertain how they have affected the interests of the parties, and in particular in what person or persons the legal estate in fee simple in the land became vested under these Acts.

(1) [1899] 1 Ch. 275.

For this purpose it is necessary to refer in the first place to paras. 3 and 5 of the Transitional Provisions contained in Part II. of the First Schedule to the Law of Property Act. Para. 3 is, so far as material, in these terms: "Where immediately after the commencement of this Act any person is entitled . . . . to require any legal estate (not vested in trustees for sale) to be conveyed to or otherwise vested in him, such legal estate shall, by virtue of this Part of this Schedule, vest in manner hereinafter provided." Para. 5 is, so far as material, as follows: "For the purposes of this Part of this Schedule, a tenant for life . . . . shall be deemed to be entitled to require to be vested in him any legal estate in settled land . . . . which he is, by the Settled Land Act, 1925, given power to convey." If, therefore, the plaintiff is by the Settled Land Act given power to convey the legal estate in fee simple in the land, then such legal estate will vest in him: see Sch. I., Part II., Law of Property Act, 1925, para. 6 (*c*). It is accordingly necessary to ascertain whether the land is settled land within the meaning of the Settled Land Act, for, if it is not, the plaintiff has not been given power to convey the legal estate. As to this it seems quite clear that the land is settled land within the meaning of sub-s. 1 (i.) of s. 1 of the Act, unless the land is held upon trust for sale within the meaning of sub-s. 7 of that section (as amended).

Now "trust for sale" is defined as meaning, in relation to land, an immediate binding trust for sale whether or not exercisable at the request or with the consent of any person, and it was contended before me that the land is not held upon an immediate binding trust for sale within the meaning which it was said had been given to those words by Tomlin J. in *In re Leigh's Settled Estates.* (1) In that case the learned judge came to the conclusion that where the subject-matter of a settlement is the whole unincumbered fee simple, "the land" is not "subject to an immediate binding trust for sale," so long as there is not a trust for sale which is capable of overriding all charges having, under the settlement, priority

(1) [1926] Ch. 852.

ROMER J.
1927
PARKER'S SETTLED ESTATES, *In re.*
PARKER *v.* PARKER.

to the trust for sale. At the time that this decision was given the Law of Property (Amendment) Act, 1926, had not been passed, so that the learned judge was not dealing with sub-s. 7 of s. 1 of the Settled Land Act. He was merely dealing with s. 20, sub-s. 1 (viii.), of the Act. But I feel some little doubt as to whether the learned judge held that "the land" in the case before him was not subject to any trust for sale, inasmuch as the subject-matter of the trust was merely the fee simple subject to the incumbrance, or whether he held that no land can ever be subject to a binding trust for sale, unless the trustees have power to overreach prior equitable interests. If the latter be the real reason of his decision, I find myself, with the greatest respect, unable to follow it. For it means that there cannot be, within the meaning of the Settled Land Act, any trust for sale of land that is subject to equitable interests, unless the trustees have a legal estate and are either two or more individuals approved or appointed by the Court, or the successors in office of such individuals or a trust corporation.

Now "trust for sale" in relation to land has the same meaning in the Law of Property Act, the Trustee Act, 1925 (15 Geo. 5, c. 19), and the Administration of Estates Act, 1925 (15 Geo. 5, c. 23), as it has in the Settled Land Act, and in these Acts the expression "trust for sale" appears in a number of sections which must, in my opinion, be carefully considered before one arrives at the conclusion that a trust for sale in relation to land means a trust under which prior equitable interests can be overreached. It is indeed expressly stated in the Settled Land Act that "trust for sale" and "trustees for sale" have the same meaning as in the Law of Property Act. Let me begin with s. 2, sub-s. 2, of the Law of Property Act as it now stands. The words "trust for sale" in that section clearly do not bear that meaning, as was pointed out by Tomlin J. in *In re Leigh's Settled Estates (No. 2)*. (1) There would not otherwise, he said, be any point in the sub-section. He therefore treated it as being one of the cases where the context "otherwise requires" within

(1) [1927] 2 Ch. 13.

the meaning of the general definition clause. Passing over s. 16, sub-s. 6, s. 18, sub-s. 1, and s. 22, sub-s. 2, of that Act, in which the context would again seem to require otherwise, I turn to the clauses that are grouped together under the heading, "Dispositions on Trust for Sale." The expression "trust for sale" in those sections surely cannot bear the meaning in question. It seems impossible to suppose for instance that the protection given to purchasers by ss. 23, 26 and 27, and to the beneficiaries by s. 26, sub-s. 3, and s. 30, or the provisions of s. 24, or the power to postpone given by s. 25 only apply in cases where the trustees can overreach prior equitable interests, more especially having regard to the fact that many of the sections in terms apply to a trust for sale created before the Act came into operation at all, and therefore before trustees for sale had obtained the statutory means of overreaching such interests.

In this connection reference must also be made to the transitional provisions dealing with land held just before the Act came into force in undivided shares. These provisions according to s. 39, sub-s. 4, of the Act are to have effect for subjecting such land to "trusts for sale." But by para. 1 (2.) of Part IV. of Sch. I., where "the entirety of the land (not being settled land) is vested absolutely and beneficially in more than four persons of full age entitled thereto in undivided shares free from incumbrances affecting undivided shares, but subject or not to incumbrances affecting the entirety, it shall, by virtue of this Act, vest in them as joint tenants upon the statutory trusts." Now the provisions of Part IV. of this Schedule are described as being "Provisions subjecting land held in undivided shares to a trust for sale," and s. 35 of the Act provides that land held upon the statutory trusts shall be held upon trust to sell the same. It seems quite clear therefore that the Legislature treated the statutory trusts as being "trusts for sale." But where, in a case falling within para. 1 (2.) of Part IV., the entirety of the land is subject to an equitable incumbrance the land does not vest free from such incumbrance, and the former tenants in common are not in a position to sell free from it. This indicates that

ROMER J. 1927 PARKER'S SETTLED ESTATES, *In re.* PARKER *v.* PARKER.

the Legislature did not attach to the words "trust for sale" the meaning in question. I have referred in particular to the case of land which is within the provisions of para. 1 (2.) of Part IV., but is subject to an equitable charge affecting the whole, as it was precisely a case of this description that was considered by the Court of Appeal in *In re Ryder and Steadman's Contract.* (1) It seems clear from the judgment of Sargant L.J. that he treated the land in that case as having become vested in the former tenants in common upon "trust for sale" within the meaning of the Act. I need not refer in detail to the other sections of the Law of Property Act, such as s. 36, sub-s. 1, in which the words "trust for sale" or "trustees for sale" are used. It is sufficient to say that I am unable to come to the conclusion that in any section of the Act the words, when used in relation to land that is subject to an equitable incumbrance, refer exclusively to trusts of which the trustees have a legal estate in the land and are two or more individuals, or the successors of individuals, approved or appointed by the Court, or a trust corporation.

Turning now to the Trustee Act, I would call attention to s. 12, sub-s. 1, s. 14, sub-s. 2, s. 20, sub-s. 3 (*c*), s. 27, sub-s. 1, s. 32, sub-s. 2, s. 34, sub-ss. 1, 2, and s. 35, sub-s. 1, in all of which the expression "trust for sale" appears. I cannot think that in any one of them the expression when used in relation to land is used in the restricted sense mentioned above. Sect. 14, sub-s. 2, indeed shows that in the view of the Legislature there may be a trust for sale of land of which there is a single trustee not a trust corporation, and s. 35, sub-s. 3, indicates that there may be a trust for sale within the meaning of the Act of an equitable interest in land.

In the Administration of Estates Act, 1925, the expression occurs, I think, in only two sections, in s. 39, sub-s. 1 (ii.) (where, oddly enough, it is preceded by the word "effectual"), and in s. 41, sub-s. 6. The former of these throws no light upon the matter to be decided. But in the latter it would be absurd to give it the restricted meaning. It may also be observed that if "trust for sale" be given that meaning,

(1) [1927] 2 Ch. 62.

the personal representatives of the intestate owner of real estate subject to an equitable charge, though directed to hold such estate upon trust to sell, would not, unless a trust corporation, hold it upon a "trust for sale." The Land Charges Act, 1925 (15 Geo. 5, c. 22), does not, I think, throw any light upon the matter. The conclusion, however, that I come to as a result of a consideration of all the Acts is that the words "trust for sale," when used in reference to land that is subject to a prior equitable interest, are not confined to cases where that equitable interest can be overreached by the trustees. It may be said that in that case no effect is given to the word "binding." But the word may quite conceivably have been inserted to meet a case of a revocable trust for sale such as existed in *In re Goodall's Settlement* (1), and even if this be not so I should prefer to treat the word as mere surplusage, inserted ex majore cautela, rather than give to it a meaning that would exclude from being trusts for sale innumerable trusts which are indubitably trusts for sale, as that phrase has always been understood by lawyers hitherto, and which would either exclude them without any apparent reason from a very large number of the general provisions of the Acts relating to "trusts for sale," or would necessitate the Court holding that the context required some other meaning to be attributed to that expression.

There is therefore, in my opinion, a trust for sale in the present case affecting the legal estate in fee simple vested in the trustees of the 1924 deed. But is there a trust for sale that brings the present case within the exception to s. 1 of the Settled Land Act introduced by the new sub-s. 7? In my opinion there is not. It is, I think, reasonably clear that that sub-section only applies where "the land" that would otherwise be the subject of a settlement under sub-s. 1 is held upon trust for sale.

Now in *In re Leigh's Settled Estates* (2) Tomlin J. in dealing with s. 20, sub-s. 1 (viii.), of the Settled Land Act, said that in his opinion the expression "unless the land is subject to

(1) [1909] 1 Ch. 441. (2) [1926] Ch. 852.

ROMER J. 1927 PARKER'S SETTLED ESTATES, *In re.* PARKER *v.* PARKER.

an immediate binding trust for sale" meant unless the land that is the total subject-matter of the settlement is subject to a trust for sale which operates in relation to the whole subject-matter of the settlement. Inasmuch as it appeared, at the time his decision was given, as if the trustees for sale could not overreach the family charge which had priority to the trust for sale, but which had been created in pursuance of a power contained in the compound settlement, he held that "the land" was not subject to an immediate binding trust for sale, although, as I have already stated, I am not altogether sure whether that was because there was in his view no binding trust for sale affecting any land, or because there was not a trust for sale that affected the whole subject-matter of the settlement. The trust for sale in that case did, however, affect the whole legal estate in the land that was the subject-matter of the alleged settlement; and if "trust for sale" means what I think it does, it may well be that, in view of the subsequent enactment of sub-s. 7 of s. 1, the land was excluded from the definition of settled land, even though the trustees, for the moment, had not power to override the family charge: see as to this the observations of Sargant L.J. in *In re Ryder and Steadman's Contract.* (1) For although by virtue of s. 117, sub-s. 1 (ix.), of the Settled Land Act, land includes an interest in land not being an undivided share, it is impossible to read what are commonly called "the curtain" provisions of the Settled Land Act and the Law of Property Act without seeing the importance attached to the possession of the legal estate; and it would, I think, be proper and in accordance with the general spirit of the Acts to regard all cases in which the whole legal estate, that would otherwise be comprised in a settlement, is vested in trustees for sale, as coming within sub-s. 7 of s. 1. But in the present case there is a legal estate in the term of 1000 years which cannot be disposed of under the trust for sale, and which, upon the coming into force of the Law of Property Act, 1925, would seem to have vested in the trustees of the portions term by virtue of para. 3 of Part II. of

(1) [1927] 2 Ch. 62, 83.

Schedule 1 of that Act. The whole legal estate which is the subject-matter of the settlement is not therefore subjected to a trust for sale, and in my opinion sub-s. 7 has no application to the case.

I therefore hold that the land in question is settled land within the meaning of the Settled Land Act under a compound settlement consisting of the will, the indenture of November 12, 1901, the disentailing assurance, and the two deeds of September 29, 1924. Of this compound settlement the plaintiff is tenant for life, and the vesting deed ought to be made in his favour. As from the date of this vesting deed the term of 1000 years will take effect only in equity.

It only remains to deal with the last question contained in the originating summons. That question is as follows: "If it be determined that the said land is settled land as aforesaid then whether in the event of an order being made while the said land remains settled land as aforesaid approving or appointing (within the meaning of sub-s. 2 of s. 2 of the Law of Property Act, 1925) the plaintiff and the defendants, John Warneford Parker and Christopher Haworth Burne, or other the trustees for the time being of the said indenture of conveyance on trust for sale of September 29, 1924, and the said indenture of settlement of even date therewith the said land thereupon ceases to be settled land as aforesaid." The answer is obviously in the negative, and for more than one reason. It is sufficient to say that, being settled land, the legal estate in fee simple is vested in the plaintiff as tenant for life and not in the trustees, so that s. 2, sub-s. 2, of the Law of Property Act would not be applicable.

Solicitors: *Lawrence, Graham & Co.*

P. J. B.

C. A. 1927 *Oct.* 18, 19, 20; *Nov.* 14.

PALMOLIVE COMPANY (OF ENGLAND), LIMITED *v.* FREEDMAN.

[1926. P. 2657.]

Restraint of Trade—Price Maintenance Agreement—Proprietary Article—"Howsoever acquired"—Validity.

In consideration of being placed on the plaintiffs' wholesale list and allowed their wholesale discount for the time being, the defendant, a wholesaler and retailer, agreed (inter alia) not to sell Palmolive soap "howsoever acquired" to the public under sixpence a tablet:—

Held, by the Court of Appeal, that as the agreement was not in general restraint of trade, but only imposed restrictions in respect of particular proprietary articles with which neither the defendant nor the public were bound to deal, the agreement was not injurious to the public.

Held, also, by Lord Hanworth M.R. and Lawrence L.J. (Sargant L.J. dissenting), that the agreement though unlimited in time and space and extending to the particular class of goods "howsoever acquired" was not in the circumstances unreasonable as between the parties.

Decision of Astbury J. [1927] 2 Ch. 333 affirmed.

APPEAL from a decision of Astbury J. (1)

The plaintiffs were vendors of Palmolive toilet soaps and toilet preparations which they bought from their parent company in Canada.

The defendant, who carried on business as "The Economical Bazaars," had one wholesale warehouse and many retail branch shops at which he sold (inter alia) Palmolive toilet soap and preparations. By the custom of the trade he was treated as a wholesaler.

On August 10, 1926, the plaintiffs sent a circular letter to the defendant and other wholesale customers explaining the advantages of a price maintenance agreement which they enclosed, together with a circular to the retailers and another agreement for them to sign.

On August 23, 1926, the defendant signed this wholesalers' agreement. It was headed "Price Agreement" and addressed to "The Palmolive Company (of England), Ld. (hereinafter referred to as the company)." It provided as follows: "In consideration of the company agreeing to

(1) [1927] 2 Ch. 333.

place my name upon the list of those entitled to purchase and sell Palmolive preparations at wholesale and allowing me the current wholesale trade discount for the time being I agree with you from this date :—

(*a*) To sell Palmolive preparations howsoever acquired only to customers approved by you and with your consent, such approval and consent to be assumed in the case of our regular customers unless you have in writing vetoed any sales to such customers.

(*b*) Not to sell barter or otherwise supply Palmolive preparations to or for sale to any other wholesaler without the written consent of the company.

(*c*) To maintain the prices of Palmolive preparations in respect of sales to retailers at the prices listed on the back of this agreement under the heading 'Price list for the retail trade' and in respect of sales to the public at the prices listed on the back of this agreement under the heading 'Prices to the consumer' or at such other prices as shall from time to time be fixed by the company in respect of both classes of sales and not to sell such preparations howsoever acquired at less than such fixed prices."

The consumer's price for Palmolive soap was fixed at sixpence a tablet.

This agreement was sent to the plaintiffs on August 25 with a letter asking them to expedite delivery of a previous order for Palmolive soap. The soap was delivered on wholesale terms.

On September 14 the defendant ordered more soap from the plaintiffs' traveller, telling him he had already signed the price agreement. At the traveller's request he signed an identical agreement ex abundanti cautela. This order was then executed on wholesale terms. For simplicity these two identical agreements are hereinafter referred to as one.

Shortly after this the defendant, finding that many shops were selling Palmolive soap under sixpence a tablet, followed their example, and declined to be bound by his agreement. He now obtained his soap from independent wholesale and retail sources, though the form of retailer's agreement with

C. A. 1927 PALMOLIVE CO. (OF ENGLAND) v. FREEDMAN.

the company provided that the retailer would not sell Palmolive preparations under the listed prices and would not supply them to or for sale to any other retailer or wholesaler.

On December 22, 1926, the plaintiffs commenced this action for an injunction.

On January 21, 1927, Astbury J. granted an interlocutory injunction until the trial in respect of soap supplied by the plaintiffs, but at the trial the plaintiffs asked for an injunction in respect of Palmolive soap "howsoever acquired."

The defendant's case was that the contract was in restraint of trade, contrary to public policy and illegal. It imposed on the defendant a greater restriction than was reasonably required for the plaintiffs' protection, and the restraint was not reasonable in the public interest. The contract was non-severable and therefore bad as a whole. Even if severable the restriction as to soap "howsoever acquired" was invalid.

Astbury J. held that the agreement was not in general restraint of trade, but only imposed a restriction in respect of a proprietary article with which the defendant was not bound to deal, and, consequently, notwithstanding the non-severability of the wide terms "howsoever acquired," the agreement was reasonable and could be enforced by injunction.

The defendant appealed. The appeal was heard on October 18, 19 and 20, 1927.

Archer K.C. and *P. B. Morle* for the defendant.

Jowitt K.C. and *Courtney Terrell* for the plaintiffs. The arguments, which were substantially the same as those used in the Court below, sufficiently appear from the judgments of the Court of Appeal.

[The following cases were referred to: *Elliman, Sons & Co.* v. *Carrington & Son* (1); *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* (2); *Dunlop Pneumatic Tyre Co.* v. *New*

(1) [1901] 2 Ch. 275. (2) [1913] W. N. 46; 29 Times L. R. 270.

Garage and Motor Co. (1); *North Western Salt Co.* v. *Electrolytic Alkali Co.* (2); *Herbert Morris, Ld.* v. *Saxelby* (3); *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (4); *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* (5); *Joseph Evans & Co.* v. *Heathcote* (6); *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.* (7)]

Cur. adv. vult.

Nov. 14. The following written judgments were delivered:—

LORD HANWORTH M.R. In this case Astbury J., at the close of the trial of the action before him on May 27, 1927, granted a perpetual injunction restraining the defendant, his servants and agents from failing to maintain the prices of the plaintiffs' toilet preparations in respect of sales thereof to the public, by charging in respect of such sale prices lower than those specified by an agreement made by the defendant with the plaintiffs and dated August 23, 1926. From this order the defendant appeals, and claims that the agreement sued upon is in restraint of trade, contrary to public policy, and void as being illegal. He claims that the agreement imposes upon the defendant a greater restriction than is reasonably required for the protection of the plaintiffs, and that the restraint is not reasonable in the interests of the public.

The plaintiffs carry on business as vendors of Palmolive toilet soap and toilet preparations, while the defendant has a number of shops in which he sells, among other things, toilet soap and similar preparations. They are known as "The Economical Bazaars." The plaintiffs have adopted a system, the object of which is to maintain the prices of their preparations; and before the contract in question was entered into they had sought, by letter, an assurance that the defendant would maintain the price stipulated for by them. By a letter dated August 10, 1926, and an enclosure therein, the plaintiffs made the defendant acquainted

(1) [1915] A. C. 79.
(2) [1914] A. C. 461; [1913] 3 K. B. 422.
(3) [1916] 1 A. C. 688.
(4) [1894] A. C. 535.
(5) [1915] A. C. 847.
(6) [1918] 1 K. B. 418.
(7) [1913] A. C. 781.

C. A. 1927

PALMOLIVE CO. (OF ENGLAND) v. FREEDMAN.

Lord Hanworth M.R.

with the development of their plans to protect the price of Palmolive soap, which included the grant of a temporary bonus to buyers, who co-operated with them, and undertook not to sell except at the price fixed by the plaintiffs. These terms and the price proposed undoubtedly offered a considerable margin of profit to the buyers of the soap, whether they purchased wholesale, or in small quantities. A notice that the price fixed as from the following September 1 was 6*d.* a tablet, was sent to the defendant on August 12.

The defendant sent an order for a quantity of soap, and on August 25 returned the agreement dated August 23, which is the basis of this action, duly signed, and urged the plaintiffs to expedite delivery of the soap which he had ordered. The soap was delivered. The defendant did not adhere to the terms of his agreement, but sold soap in his shops at a price below that fixed by the plaintiffs. In a letter dated November 20, 1926, the defendant avowed his intention of not adhering to his agreement of August 23, on the ground that the percentage of profit available to him at the price fixed by the plaintiffs was so high that if he adhered to it "he would be liable for profiteering: in fact he thinks your percentage of profit so high as to be harsh to the public, and no judge would pass it, were it brought before him."

In further correspondence the defendant stated in plain terms: "I do not mean to abide by the company's price agreement as I consider it harsh and unfair." Accordingly the writ in the action was issued on December 22, 1926, claiming an injunction to the effect granted by Astbury J. The conditions contained in the agreement signed by the defendant on which the soap was delivered to him are as follows: "In consideration of the company agreeing to place my (our) name upon the list of those entitled to purchase and sell 'Palmolive' preparations at wholesale, and allowing me (us) the current wholesale trade discount for the time being I (we) agree with you from this date: (*a*) To sell 'Palmolive' preparations howsoever acquired only to customers approved by you and with your consent, such approval and consent to be assumed in the case of our regular

customers unless you have in writing vetoed any sales to such customers. (*b*) Not to sell, barter or otherwise supply 'Palmolive' preparations to or for sale to any other wholesaler without the written consent of the company. (*c*) To maintain the prices of 'Palmolive' preparations in respect of sales to retailers at the prices listed on the back of this agreement under the heading 'Price List for the Retail Trade' and in respect of sales to the public at the prices listed on the back of this agreement under the heading 'Prices to the Consumer' or at such other prices as shall from time to time be fixed by the company in respect of both classes of sales and not to sell such preparations howsoever acquired at less than such fixed prices."

From the facts proved at the trial it appears that, in addition to the soap directly supplied to the defendant by the plaintiffs—the defendant was able to obtain, and did obtain, soap of the plaintiffs from other sources. The soap is made in Canada and shipped to the plaintiffs, who are not the manufacturers but the sole distributors of the soap in this country. There is another distributing agency in France; and owing to the values of the franc, it is probable that some soap was shipped from France to England and provided this other source of supply.

At the material dates the system of the plaintiffs to maintain prices had not proved perfect, for it takes time to eliminate sellers at the under-value and to stop supplies reaching them. The defendant's attitude however is adopted to test the validity of the price maintenance agreement. He stated that it does not concern him whether those who sell to him at a figure lower than the fixed price are breaking any agreement. He presumes they are doing so, but he does not ask any question about that—he merely seeks the goods and accepts them without further inquiry. The question therefore in the action is whether the agreement imposing the conditions set out above is valid and enforceable. The defendant claims complete freedom from it.

Agreements to maintain prices have been upheld in a number of cases: see *North Western Salt Co.* v. *Electrolytic*

C. A. 1927 PALMOLIVE CO. (OF ENGLAND) v. FREEDMAN. Lord Hanworth M.R.

Alkali Co. (1), where Lord Moulton said that it was a hopeless task to argue that such a contract is, ex facie, against public policy. In *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.* (2) Lord Parker said: "The Crown, therefore, cannot in their Lordships' opinion, rely on the mere intention to raise prices as proving an intention to injure the public." He gives expression to the wider considerations which apply, from the public point of view, to the maintenance of prices—namely, for the purpose of giving a fair remuneration for the capital employed, and the labour expended, so as to prevent business being carried on at a loss, and the reduction of wages to a minimum. In the same judgment he also said that the learned judges whose judgment he was delivering—including Lord Haldane, Lord Shaw and Lord Moulton—were not aware of any case in which a restraint, though reasonable in the interest of the parties, had been held unenforceable because it involved some injury to the public.

Concluding his judgment in the famous case of *Mitchel* v. *Reynolds* (3) Lord Macclesfield said: "In all restraints of trade, where nothing more appears, the law presumes them bad; but, if the circumstances are set forth, that presumption is excluded, and the Court is to judge of those circumstances, and determine accordingly; and if upon them it appears to be a just and honest contract, it ought to be maintained." It is worth while to go back to this statement in the locus classicus upon restraints of trade, for it gives a wider range and greater flexibility to the considerations to be weighed, than is apparent in some of the later decisions. The law has become modified so as to be conformable to modern ideas and views of public policy and of reasonableness: see per Lindley L.J. in *Maxim Nordenfelt Guns and Ammunition Co.* v. *Nordenfelt* (4), but it is clear that a contract involving restraint of trade, and in particular for the maintenance of prices, is not necessarily bad. There must be consideration

(1) [1914] A. C. 461, 477.
(2) [1913] A. C. 781, 810.
(3) (1711) 1 P. Wms. 181, 196; 1 Sm. L. C., 12th ed., 458, 469.
(4) [1893] 1 Ch. 630, 647.

for the contract, even though the adequacy of the consideration cannot now be inquired into—and the restraint must be reasonable. Whether the restraint is partial or general, it must be reasonable both "in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public." Those are the words in which Lord Macnaghten in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (1) sums up the fair result of the authorities.

The Court, as Lord Parker points out in *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.* (2) has to determine whether a restraint of trade is reasonable either in the interest of the parties or in the interest of the public; that question falling to be determined after construing the contract and considering the circumstances existing when it was made. "It is really a question of public policy and not a question of fact upon which evidence of the actual or probable consequences, if the contract be carried into effect, is admissible."

With these considerations before me, I attach little significance in the present case to the question on which side the onus lies of proving special circumstances to negative the presumption that an agreement in restraint of trade is bad, though I must state that on this point I do not agree with the learned judge, who declared that the onus lay upon the defendant of showing that his contract is invalid.

There was evidence before the learned judge as to the purpose of this agreement and the circumstances in which it was made. So far as the public is concerned, after the passages I have quoted, slight evidence—if any—is needed to justify an agreement for the maintenance of prices; and the Court "regards the parties as the best judges of what is reasonable as between themselves": see per Lord Haldane in the *North Western Salt* case. (3) The agreement being one

(1) [1894] A. C. 535, 565. (2) [1913] A. C. 781, 797.
(3) [1914] A. C. 461, 471.

C. A. 1927 — PALMOLIVE CO. (OF ENGLAND) v. FREEDMAN. — Lord Hanworth M.R.

of the nature considered in that case, it would appear to be not illegal ex facie ; in the sense that it is contrary to public policy. The real and substantial question is whether its scope and terms are reasonable. Upon this point, I think the defendant who entered into the agreement and now contests it must justify his changed attitude : see per Lord Sumner. (1)

I come, therefore, to the consideration of the agreement itself. Is it reasonable ?

I attach no significance to the point raised that it covers all sources of supply—as well those aliunde, as that from the plaintiffs direct. If an agreement for the maintenance of prices is to be effective, it seems to me that it must necessarily cover all sources of supply and not stultify itself by leaving open and uncovered by any agreement a source of the same goods which may be sold at a price below that stipulated for in the agreement.

Next, it appears important to bear in mind the subject-matter of the agreement. It does not relate to services to be rendered by a servant to an employer—a relation which the Courts have safeguarded and not allowed to be the basis for unfair terms, throwing the servant out of employment unnecessarily.

Further, the agreement does not cover the whole trade of the defendant—as in *Joseph Evans & Co*, v. *Heathcote* (2) —to which I will refer again.

The agreement does not enforce a general restraint. It relates only to a series of proprietary articles sold by the plaintiffs : articles which form only a few items in the catalogue of goods sold in the " Economical Bazaars." There is no definite evidence as to the quantum of the plaintiffs' articles which are in ordinary course sold by the defendant, nor as to the relative percentage that such sales bear to the total turnover in the defendant's shops. But upon the material available, it would seem that not much inconvenience in his trade would be caused to the defendant if he never sold another of the plaintiffs' preparations, and equally the plaintiffs

(1) [1914] A. C 480. (2) [1918] 1 K. B. 418.

might be able to find other shops to sell the goods—even if the defendant did not do so—for Astbury J. found no evidence before him that the prices fixed for the articles were other than reasonable from a trader's and purchaser's point of view.

In *Maxim Nordenfelt Guns and Ammunition Co.* v. *Nordenfelt* (1) a covenant not to engage in the business of a manufacturer of guns or ammunition—a covenant unlimited as to space and practically covering the remainder of the defendant's life—was upheld as reasonable under the circumstances. That decision was affirmed in the House of Lords. (2) Lord Macnaghten (3) emphasizes the different considerations that must apply in cases of apprenticeship and cases of the sale of a business. That differentiation was illustrated in *Herbert Morris, Ld.* v. *Saxelby* (4), where an employee was released from his covenant as being in its terms wider than was necessary for the protection of the plaintiffs' business. In *Joseph Evans & Co.* v. *Heathcote* (5) the covenant was held unreasonable, as imposing unnecessary terms on the plaintiffs, particularly in two features : one that there was a restriction on the sale of the plaintiffs' goods to any but five purchasers who entered into no corresponding obligation to buy the plaintiffs' output, and secondly that there was no power of withdrawal reserved to the plaintiffs.

This latter objection does not in my judgment come into play in the present case. There is no relationship established between the parties as there is between a manufacturer and a purchaser of his whole output. The case we are considering here is one in which a merchant is unable to become a trader in certain goods except upon the terms imposed by the vendor of them. The vendor may fix a price so high as to be ridiculous and then fail to sell his goods. That is his loss. But if a man accepts the terms offered, I cannot see that the Court must declare the terms imposed and accepted unreasonable, in order to give the acceptor terms more agreeable to his judgment, when his general trade, and trading

(1) [1893] 1 Ch. 630.
(2) [1894] A. C. 535.
(3) Ibid. 566.
(4) [1915] 2 Ch. 57; [1916] 1 A. C. 688.
(5) [1918] 1 K. B. 418.

C. A. 1927

PALMOLIVE CO. (OF ENGLAND) v. FREEDMAN.

Lord Hanworth M.R.

power otherwise, is not affected by the contract entered into. There is no restriction as to the defendant selling other soap, or the preparations of other manufacturers or proprietors. He is as free to deal with them as he was before the contract was signed.

Different considerations might possibly apply if the contract provided that the defendant should in any event purchase a periodic and definite amount of the plaintiffs' preparations, or if his power to sell other goods was restricted by it. No such obligation is imposed upon the defendant. He is only placed on a list enabling him to become a purchaser of the plaintiffs' articles if in the course of his trade he is minded so to do. Attention was paid to these same considerations to which I have adverted in *Elliman, Sons & Co.* v. *Carrington & Son* (1) and *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* (2), which were, in my judgment, rightly decided on the question of the reasonableness of the contract, and I agree with Astbury J.'s observations upon the latter case when it was discussed in the House of Lords.

I hesitate to embark upon the niceties of the trading problems involved. It may be, or may not be, unfortunate if Palmolive preparations are not to be on sale in these bazaars. At least the defendant has his choice whether or not he will sell them. But if he determines to sell them why should not the terms as to price, bonus, payment and the like, be matters to be decided between the parties? If they are of a standing not unequal in relation to each other, there is no question of one overreaching the other; and it has been said many times that commercial men are the best judges of what is reasonable between them. After examining this contract to maintain prices and the features to which criticism has been directed, I am unable to hold it unreasonable between the parties. I thus agree with the conclusion of Astbury J., while differing with regret from the judgment of Sargant L.J.

The appeal will be dismissed with costs.

(1) [1901] 2 Ch. 275. (2) 29 Times L. R. 270.

SARGANT L.J. The defence here is that the two contracts sued on, which are in identical terms, are in restraint of trade (which is not denied) and are unenforceable. For the purpose of dealing with such a defence it is well settled that the Court should first ascertain the special circumstances in which the contract impugned was executed, and should then consider whether its terms are reasonable both in the interests of the parties and in the interests of the public. Should the contract satisfy both these tests then the defence fails; but, should it fail in either test, then the defence succeeds: see amongst other cases *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.* (1); *Herbert Morris, Ld.* v. *Saxelby* (2); *Joseph Evans & Co.* v. *Heathcote.* (3)

The plaintiffs here are the sole recognized distributors in this country of Palmolive soap and similar Palmolive preparations made by manufacturers in Canada. At the date of the contracts in question—namely, in the late summer of 1926—they were anxious to secure that the Palmolive preparations should be sold to the public at fixed uniform prices, which in the case of Palmolive soap was to be 6*d.* per cake; and that there should be no undercutting. And for that purpose they drew up and caused to be printed certain forms of contract, which in the case of purchases by wholesalers were on small green slips and were conspicuously headed, "Price Agreement"; and these green slips they tendered to persons desiring to buy wholesale from them, and required these persons as a condition of being supplied to sign and return the slips. In fact, however, at the date in question the plaintiffs were unable to secure any such uniformity of price as they desired in the wholesale and still less in the retail market. From various causes, and particularly owing to the extraordinary depreciation in the French exchange, which reached its maximum about the summer of 1926, it was profitable to obtain Palmolive soap from other sources of supply than the plaintiffs, and to sell

(1) [1913] A. C. 781. (2) [1916] 1 A. C. 688.
(3) [1918] 1 K. B. 418.

C. A. 1927

PALMOLIVE CO. (OF ENGLAND) v. FREEDMAN.

Sargant L.J.

such soap (and indeed some of the soap bought wholesale from the plaintiffs) at retail prices considerably below 6*d.*, such as 5½*d.*, 5*d.* and even 4½*d.* The only witness called for the plaintiffs—namely, their sales manager—admitted in terms that there were scores of places at the time of the trial (May 26, 1927), and there had been at all material times in the case, at which the soap could be bought retail for less than 6*d.* per cake. And this admission was amply confirmed by the witnesses for the defence.

It is clear, therefore, that, however well intentioned the plaintiffs' scheme may have been, it has not even yet been crowned with success, and that there was at the date of the contract and is now nothing more than a possibility, or at the most a probability, of their being ultimately able to secure the fixed uniform retail price which they desire. Indeed, they have been forced to meet the French and other competition first by a bonus scheme and afterwards by a coupon scheme, either of which has resulted in the retailer being able to get the soap at so low a price that he can sell it to the public at a profit at a price less than 6*d.* And it is clear from the evidence that the plaintiffs have failed hitherto to reach and bind a great number of retailers; that such retailers are entitled to sell at less than 6*d.* without committing any breach of contract, and do so sell; and that the only way in which the plaintiffs can restrain them is by endeavouring to identify the retailers in question and by then forbidding their wholesale dealers to supply them—an elaborate process, and one neither speedy nor certain to succeed.

These being the special circumstances existing at the date of the agreements in question, which can for simplicity be treated as a single contract, it now becomes necessary to consider whether this contract was reasonable both in the interests of the contracting parties and in the interests of the public. I will deal with the second question first. As to this the defendant has affected to pose as a champion of the public; has protested on their behalf against the enormous percentage of profit evidenced by the difference in the price paid to the plaintiffs by wholesalers, and that

paid to retailers by the public, if buying at 6*d.* per cake; and has in effect said, "res ipsa loquitur," there is here a clear case of extortion from the public. But to my mind the defendant has not succeeded on this part of the case. He has neglected the fact that both the wholesaler and the retailer have to make a profit; he has made no trustworthy estimate of the necessary expenses either of the wholesaler or the retailer in conducting business, especially in relation to an article that has still to establish itself firmly in the market; and he has not paid sufficient attention to the fact that this soap is after all only one of many proprietary soaps, and that therefore in the keen competition between them this soap must necessarily find its level in relation to value and price, and that to speak of extortion from the public with regard to it is little better than an absurdity. So far as the interests of the public are concerned the observations of Lord Parker in the *Adelaide Steamship Co.'s* case (1) are very relevant here, and practically conclusive. Indeed, in this respect the case here is infinitely weaker than that case, since there an article of prime necessity was concerned, while here one special kind of toilet soap only is in question.

The real pinch of the present case is as to the reasonableness of the contract as between the two contracting parties. On a first and cursory reading the form of the contract does not suggest much that is objectionable or unreasonable from the point of view of the wholesale purchasers. But when the point comes to be examined more narrowly, particularly in view of the extensive claim made by the plaintiffs in this action, the matter assumes a very different complexion.

In the first place it is to be noted that there is no reciprocity in the agreement. The plaintiffs are not bound to continue to keep the name of the wholesaler on the list there referred to; and even while the name is on the list that circumstance does not give the wholesaler any definite right to a supply of the soap; he is merely one of a number of possible customers who are not under a ban against being supplied.

(1) [1913] A. C. 781.

C. A. 1927 PALMOLIVE CO. (OF ENGLAND) v. FREEDMAN. Sargant L.J.

Again, the obligations imposed on the defendant by the contract do not merely relate to soap (which is what he bought) but include all other the preparations of the plaintiffs as set out in a list on the back of the printed contract, and also—a more important matter—extend to any of these preparations whether acquired from the plaintiffs or from any other source. The obligations are in no way dependent on the plaintiffs' scheme for regulating prices being generally successful, or on their continuing to supply the defendant, but are unlimited in point of time. And their result, if enforced as the plaintiffs demand and as the learned judge has enforced them, is that as the consequence of a single purchase or two purchases the defendant is precluded during the whole of his life from selling any of the plaintiffs' preparations except, at prices which may be, and in fact are at the present time, considerably higher than the current market price in other retail shops.

The one-sided character of the contract is rendered still more obvious by the provision that the prices which the defendant is to observe without limit of time are not only those set out on the back of the contract, but those that shall from time to time be fixed by the plaintiffs; and further that any sale is only to be to customers approved by the plaintiffs, who may at any time veto sales to any customers of the defendant that they choose.

It is needless to say that the contract gives the defendant no opportunity of terminating his obligations however little he may desire to continue in relationship with the plaintiffs.

The defendant in his evidence asserted that when signing the contract he thought he was merely signing an order, and did not appreciate that he was entering into a contract as to the price at which he was to sell. The learned judge disbelieved him, and was no doubt perfectly justified in doing so. But I think it highly improbable that on a mere perusal of the printed form of contract, such as a business man would give to it before ordering goods of the plaintiffs, the defendant or any ordinary purchaser would grasp the sweeping and permanent nature of the restrictions sought to be imposed

upon him. It is not immaterial to observe from the shorthand notes of the proceedings that, although the learned judge had previously had the contract before him, and had granted an interlocutory injunction till the trial, he was when the matter came before him at the trial quite startled to find that the plaintiffs were then insisting on a right to an injunction which would endure during the whole of the defendant's lifetime, in spite of his having ceased to be a customer of the plaintiffs and having entirely terminated his connection with them. The learned judge several times referred to this claim colloquially as a "tall order." My own view is in this respect exactly the same as his. And I do not think that the defendant when signing the form of agreement can have realized its full implications better than the learned judge had originally done. This consideration negatives, or at the least very sensibly weakens, the argument sometimes urged in favour of such restrictions, that their adoption between the contracting parties shows that they were considered reasonable by both parties and so is prima facie evidence of this reasonableness in fact. The form of agreement was of course drafted by the plaintiffs, and it was, in my opinion, so drafted entirely in their own interests and without any proper regard to the interests of those who were going to be asked to sign it. I think it was a one-sided and catching agreement, particularly in regard to that feature of it which was aimed at imposing a perpetual fetter on a customer who had once dealt with the plaintiffs. Nor do I find in the correspondence between the parties that the defendant's attention was ever called to this aspect of the contract. I have naturally no sympathy with the defendant in the course which he pursued of deliberately breaking his contract with the plaintiffs quite irrespective of whether he still had stock acquired from them or not. But this is not the crucial question. What is crucial is that the terms of the contract devised by the plaintiffs go beyond what is required for their reasonable protection, and impose unreasonable obligations on the defendant, particularly as regards duration. And accordingly, though with great respect to

C. A. 1927

PALMOLIVE CO. (OF ENGLAND) v. FREEDMAN.

Sargant L.J.

the contrary opinions of the learned judge and my colleagues, I think that the appeal should be allowed.

I may add that I have not referred in detail to any decided cases, because there has been no question as to the general principles to be applied here. The only difference has been as to application to the facts in this particular case of those general principles. Of all the cases cited perhaps that of *Joseph Evans & Co.* v. *Heathcote* (1) has as great a similarity as any to the present case. But I refer to that case only as containing a comparatively recent restatement in this Court of the general principles with regard to restrictions of this kind, and not for the purpose of drawing any comparison between the facts there and the facts here.

LAWRENCE L.J. The question raised by this appeal is whether the price maintenance agreement which the defendant has signed can be enforced against him or is void as being in unreasonable restraint of trade.

It is now well established that an agreement in restraint of trade can be enforced if it be reasonable in reference to the interests of the parties and reasonable in reference to the interests of the public. This principle was clearly laid down by the House of Lords in the *Nordenfelt* case (2), and has been treated ever since as the governing principle in cases of this sort.

The proper application of this principle to the particular facts of any given case may be, and often is, a matter of difficulty. As each case must necessarily depend upon its own special facts not much guidance is obtained from decisions upon other and different facts. The object of the present agreement is to maintain the prices of Palmolive preparations consisting of certain articles in common use, such as toilet soap, shaving cream, face powder, and other similar toilet requisites made by a particular manufacturer in Canada and sold by the plaintiffs, who are the sole distributors of that manufacturer's goods in this country. Different considerations apply in cases of agreements made between independent

(1) [1918] 1 K. B. 418. (2) [1894] A. C. 535.

traders for the purpose of regulating their business relations where the law regards the parties as the best judges of what is reasonable as between themselves and in cases of agreements for service where there is less freedom of contract: see per Lord Macnaghten in the *Nordenfelt* case (1) and per Viscount Haldane L.C. in the *North Western Salt Co.'s* case. (2) In my judgment different considerations also apply in cases of agreements where the restraint operates to prevent the party from carrying on his accustomed trade altogether (whether with or without a limit of time and of space) and in cases of agreements like the present, where the restraint imposed consists merely of a restriction on the sale of a certain article in common use made by a particular manufacturer, and the trader is left free not only to sell the same kind of articles made by other manufacturers but also to sell all the numerous other articles in which he deals and to carry on his business substantially as theretofore.

The agreement here does not in my opinion differ in any material respects from the price maintenance agreements which were under consideration in *Elliman's* case (3) and in the two *Dunlop* cases. (4) Phillimore J. in the first of the Dunlop cases (which was decided in the year 1913) stated that such agreements were then in almost universal commercial use, and it cannot be doubted that at the present day they are exceedingly common. It has not been suggested that the object of these agreements is otherwise than lawful in itself, but it is strenuously contended that, for various reasons which I will consider presently, the agreement here is unreasonable, both in the public interest and in the interest of the parties.

I confess to finding it difficult from a common sense point of view in appreciating how it can properly be said to be injurious to the public that the defendant should have bound himself not to sell any Palmolive preparations, except at prices fixed by the plaintiffs. Without wishing to cast

(1) [1894] A. C. 566.
(2) [1914] A. C. 461, 471.
(3) [1901] 2 Ch. 275.
(4) 29 Times L. R. 270; 15 App. Cas. 847; [1915] A. C. 79.

C. A. 1927 PALMOLIVE CO. (OF ENGLAND) v. FREEDMAN. Lawrence L.J.

any reflection on the doubtless excellent quality of those preparations I do not think that the English public would have any reasonable ground of complaint if none of them were sold in this country at all, much less if none of them were sold by the defendant or were only sold by him at high or even excessive prices. The preparations of this particular manufacturer are not in any way essential to the community, and it is not as if the plaintiffs had acquired the control of the whole or of a substantial part of the output of some indispensable commodity (such as, for instance, coal or salt or even toilet soap) and were endeavouring to force the members of the public to pay higher prices for goods which they were practically compelled to purchase. Moreover, even in such a case the mere intention to raise prices would not establish a case of injury to the public ; it would still have to be proved that the intention was to raise the prices to an unreasonable extent ; for no such intention would be inferred, the reason being that prima facie it would be highly improbable that the seller in his own interests would want to fix unreasonable prices : see *Adelaide Steamship Co.'s* case. (1) It is perhaps worth noticing that their Lordships in that case stated that they were not aware of any case in which a restraint, though reasonable in the interests of the parties, had been held unenforceable because it involved some injury to the public, and no such case has been called to our attention on this appeal. In my judgment the contention that this agreement is unreasonable in the interests of the public is ill-founded, and fails.

The substantial question, however, remains—namely, whether the agreement is unreasonable in the interests of the parties. The answer to this question depends upon whether or not the restraint exceeds what is reasonably necessary to give effect to the lawful object in view—namely, the maintenance of prices. The agreement was signed in the following circumstances : The defendant carries on a wholesale and retail trade of considerable extent in and around London. He trades under the style of " The Economical Bazaars," and

(1) [1913] A. C. 781, 810

besides carrying on a wholesale business, owns a number of shops, in which he retails a large assortment of goods, including toilet soap and other toilet requisites. The plaintiffs have recently determined upon a scheme, having for its object the maintenance of the prices of the Palmolive preparations sold in this country, and in order to achieve their object they require every wholesale trader before purchasing any of their preparations from them to enter into an agreement in the form of the agreement in question in the present case. They also require somewhat similar agreements in the case of retail traders. The defendant, being desirous of purchasing from the plaintiffs a parcel of their Palmolive toilet soap, was asked to and did in fact sign the agreement.

Mr. Archer, in presenting the defendant's case to this Court, contended that the agreement is unreasonable in five main respects—namely, (1.) in that it fixes no time limit and contains no provision enabling the defendant to put an end to it; (2.) in that it covers all Palmolive preparations sold by the plaintiffs and is not confined to Palmolive soap, the only article, in fact, purchased by the defendant from the plaintiffs; (3.) in that it does not oblige the plaintiffs to sell any of the Palmolive preparations to the defendant; (4.) in that it covers Palmolive preparations bought by the defendant from persons other than the plaintiffs; and (5.) in that it fixes prices which give the defendant an unreasonable profit at the expense of the purchasing public.

Besides these five main objections there were two further objections which emerged and were discussed during the hearing of this appeal and which I may as well deal with at once. First, it was suggested that the plaintiffs could not enforce the agreement against the defendant because there were other traders who were not bound by similar agreements and who were selling Palmolive toilet soap at prices lower than the prices fixed by the plaintiffs. In answer to this objection, the plaintiffs say that the price maintenance scheme is new, and that they have not as yet been able completely to eliminate all cutting of prices, especially in what are known

C. A. 1927 PALMOLIVE CO. (OF ENGLAND) v. FREEDMAN. Lawrence L.J.

in the trade as "cut-shops" and "in-and-out-shops," but that they are actively enforcing the scheme and taking all reasonable steps to put a stop to any cutting of prices which they can discover. It is not suggested, much less proved, that the defendant is being victimized in any way or is being dealt with in any manner otherwise than the other customers of the plaintiffs. In the absence of any evidence to that effect, it merely comes to this, that the plaintiffs' scheme, although in active operation, has not yet completely achieved its aim, and this fact in my opinion affords no defence to this action.

Secondly, it was suggested that it was unreasonable that the plaintiffs should be empowered from time to time at their discretion to fix the minimum prices below which the defendant was prevented from selling the plaintiffs' preparations. A similar objection was unsuccessfully urged in the first *Dunlop* case. (1) Such a stipulation is usual in this kind of agreement, and is in my judgment not unreasonable. It is not to be assumed that the plaintiffs would be so foolish as to fix prices at such a high figure as to deter the public from buying, since that would kill their trade, and the defendant, who is in no way bound to stock the plaintiffs' preparations, may well have agreed to this stipulation, relying upon the plaintiffs' good sense as traders. It seems to me that such a stipulation is required from a business point of view, as the plaintiffs, owing to the prevailing market conditions or for other reasons, may find themselves compelled to vary the minimum prices from time to time and to fix either lower or higher prices. In any event, it is not the function of the Court, when dealing with a business arrangement of this kind, to look out for improbable and extravagant contingencies in order to make it void: see per Lord Macnaghten in the *Nordenfelt* case. (2)

I now propose to deal with the defendant's main objections. In support of his first objection—namely, the absence of a time limit and of a power of withdrawal—the defendant relied strongly on the decision of the Court of Appeal in

(1) 29 Times L. R. 270. (2) [1894] A. C. 535, 574.

Joseph Evans & Co. v. *Heathcote.* (1) That case, however, is clearly distinguishable from the present on the ground that the agreement there (as pointed out by Bankes L.J. (2)), provided for a state of things which might result in the shutting down altogether of the plaintiffs' manufacture. The plaintiffs were manufacturers of case tubes, and by the agreement they had purported to bind themselves not to sell their output except to five named persons, none of whom was under any obligation to buy and all of whom might cease to exist. In these circumstances, it is perhaps not to be wondered at that the Court came to the conclusion that the absence both of a time limit and of a power of withdrawal rendered the restraint unreasonable in the interests of the parties. No such considerations enter into the present case, as the agreement here could not by any stretch of imagination lead to any such result. Moreover, the insertion of a time limit or of a power of withdrawal in such an agreement as the present would not only be unusual and unbusinesslike, but would defeat the object in view. In price maintenance agreements such as this the object of the manufacturer or seller is that the prices should be maintained so long as his particular goods are manufactured or sold, and I know of no case where such an agreement has contained any such limit or power. If a time limit or power of withdrawal were inserted in such an agreement, a manufacturer or seller might find himself ruined after having expended large sums of money in building up a profitable trade. In this connection it is to be remembered that the defendant is under no obligation whatever to purchase any of the plaintiffs' preparations, and that he has not proved or even suggested that the non-stocking of these preparations would injure his trade. In the absence of any such proof or suggestion it would perhaps not be making a very wild assumption to conclude that as little injury would be caused to the defendant's trade if he were to cease stocking the plaintiffs' preparations as was caused to the trade of one of his witnesses named Smith when the latter ceased selling those preparations. Moreover,

(1) [1918] 1 K. B. 418. (2) [1918] 1 K. B. 430.

C. A. 1927

PALMOLIVE CO. (OF ENGLAND) v. FREEDMAN.

Lawrence L.J.

this witness stated that it would not hurt his trade if he were to throw out of his business half a dozen of the proprietary articles he was then selling—a statement which, for all I know to the contrary, may apply equally well to the defendant's business. In the result, I am of opinion that the first objection is not well-founded.

As regards the second objection. The consideration for the agreement was not, as is frequently the case, the purchase of a particular parcel of goods, but was the agreement by the plaintiffs to place the defendant's name upon their list of those entitled to purchase and sell all their Palmolive preparations at wholesale and to allow the defendant the current wholesale trade discount for the time being. As the consideration thus covers all the plaintiffs' Palmolive preparations, it is not only not unreasonable but natural and reasonable that the restraint should extend to the prices of all such preparations. The fact that the defendant was moved to sign the agreement because he wanted to purchase a parcel of Palmolive soap from the plaintiffs does not render the scope of the agreement unreasonably wide, nor indeed does it seem to me to be a relevant factor to take into consideration at all.

The third objection raises a question as to the true meaning of the language employed to express the consideration for the agreement. It is contended on behalf of the defendant that the agreement imposes no obligation on the plaintiffs to keep him on their list, or whilst he is on it to supply him with any of the Palmolive preparations. If this contention be sound, it is no doubt an important matter to be taken into consideration in determining the reasonableness or unreasonableness of the restraint. Speaking generally, the consideration for imposing a restraint should not be merely colourable. There should be some good consideration, though in an agreement between business men regulating their trade relationship the Court would not go with any particularity or nicety into the adequacy of the consideration. In my opinion, it is fairly clear that the agreement imposes upon the plaintiffs an obligation to supply the defendant so long

as he is on their list with any of their Palmolive preparations at the current wholesale prices, allowing him their current wholesale discounts. This, I think, follows from the fact that the list is described as a list of those entitled (inter alia) to purchase at wholesale, coupled with the fact that the plaintiffs agree to allow the current wholesale trade discount for the time being. Taking these two provisions in conjunction, their true effect, in my opinion, is that those on the list have the right (inter alia) to purchase from the plaintiffs at their current wholesale prices subject to their then current wholesale discounts for the time being, and accordingly that the plaintiffs are under a corresponding duty to sell to them at such prices and subject to such discounts.

The more doubtful question, however, is whether there is any obligation to keep the defendant on the list. It is true that the agreement does not say in so many words that the plaintiffs will keep the defendant's name on the list, but the conclusion I have come to is that construing the agreement as a whole, the true meaning and effect of it is that the consideration moving from the plaintiffs would not be satisfied by merely placing the name of the defendant on their list for a few moments and then taking it off again. The agreement is a commercial document, and must be construed in a businesslike way. The expression "agreeing to place the name on the list," when used in such a document, is, I think, used in the effective business sense as denoting "agreeing to place and keep the name on the list." That this is the proper reading of the document is, I think, borne out by the agreement to allow to the defendant the usual trade discount for the time being, which seems to me to point to the fact that the true meaning is that the name when once placed on the list should remain there. As a matter of fact, the plaintiffs have placed and kept the defendant on the list, and the latter has on two occasions taken advantage of having been so placed and kept by purchasing soap at the prices and subject to the discounts provided by the agreement. In the result I am of opinion

C. A. 1927

PALMOLIVE CO. (OF ENGLAND) v. FREEDMAN.

Lawrence L.J.

that it cannot properly be said that the consideration is merely colourable, and consequently I think that the defendant's third objection fails.

As to the fourth objection, there is in my judgment nothing unreasonable, regard being had to the object of the agreement, in a stipulation that the defendant should maintain the prices of all the plaintiffs' Palmolive preparations, whether purchased from the plaintiffs or from any other persons. Apart from being usual in such agreements, such a stipulation seems to me not only reasonable but essential if the price maintenance agreement is to be really effective. Moreover, it is inconceivable from a business point of view that the plaintiffs would agree to place a trader on their list if that trader were at liberty to cut prices whenever he chose to purchase the Palmolive preparations from somebody other than the plaintiffs, whilst at the same time being entitled when it suited him to buy the preparations from the plaintiffs and obtain the benefit of their special discounts.

The fifth and last objection is one which really goes to the question whether the restraint is unreasonable in reference to the interests of the public, a question with which I have already dealt. It is quite absurd for the defendant to attempt to maintain that it is unreasonable in reference to his own interests on the ground that it results in his making too large a profit. The truth is that the defendant being both a wholesaler and a retailer is entitled to buy at wholesale prices and obtain wholesale discounts, and can then, in his shops, sell at retail prices. At the same time it does not follow that a mere comparison of the price at which he purchases with the price at which he sells is a fair test of the profit which he makes. He obviously must have overhead charges in both branches of his trade, and therefore the deductions from the gross sale moneys must be correspondingly increased before arriving at the true profits.

I have now dealt with all the various objections urged by counsel, and in the result I have come to the conclusion that the agreement can be enforced against the defendant and is not void as being in unreasonable restraint of trade.

The provisions to which the defendant takes exception are part of the machinery for effectively working out an admittedly lawful object, and in my opinion do not go beyond what is reasonably required for that purpose. The real burden of the defendant's complaint is that these provisions are too stringent, because they operate to prevent him for all time and under all circumstances from cutting the prices of the plaintiffs' goods. His contention in substance amounts to this, that the Court ought not to uphold an agreement for the maintenance of the prices of a proprietary article unless the machinery for working out that object affords an opportunity of escape, and that if such machinery is effective and affords no such opportunity the Court ought to hold that it constitutes an unreasonable restraint of trade. In my opinion such a contention is unsound. Of course, it was for the defendant to consider whether it was worth his while from a business point of view to sign the agreement, and I have no doubt that he thought that it was. Having done so, I think that he is bound by its terms.

In my judgment the decision of Astbury J. is right, and I agree with the Master of the Rolls that this appeal fails, and ought to be dismissed with costs.

Appeal dismissed

Solicitors for defendant: *Armitage & Craig.*
Solicitors for plaintiffs: *Stock & Slater.*

W. I. C.

C. A.
1927
CLAUSON J.
July 1.
C. A.
Dec. 1.

In re ANDERSON-BERRY.

HARRIS *v.* GRIFFITH.

[1927. A. 834.]

Administrator—Principal and Surety—Bond—Sureties—Threat to distribute Estate without providing against Liability—Action by Bondsmen against Administrator—Quia Timet.

Sureties who have entered into the usual bond for the proper administration by the administrator of an intestate's estate are entitled to apply to the Court for relief quia timet, and will be granted the same by way of indemnity against their liability thereunder in a case where they have reasonable ground for anticipating jeopardy owing to a threat by the administrator, persisted in up to the issue of the writ, to distribute the estate without providing for contingent liabilities in contravention of the bond.

A quia timet action is a proceeding by which the Court is enabled to prevent its jurisdiction from being stultified.

MOTION for the appointment of a receiver of a sum of 1573*l.* 6*s.* 7*d.* forming part of the estate of Gertrude Anderson-Berry deceased in the hands of the solicitors acting for the defendant Murray Griffith, the administrator.

Gertrude Anderson-Berry died intestate on December 13, 1926, leaving her brothers, of whom the defendant Murray Griffith was one, and her sisters her statutory next of kin.

On January 20, 1927, letters of administration to her estate were granted to the defendant, who had previously, on January 7, entered into the usual bond with the principal Probate registrar that he would well and truly administer the estate of the deceased intestate. In that bond the plaintiffs William Henry Harris (who was a member of the firm of solicitors acting for the defendant administrator) and Edwin Burr joined with the defendant as sureties and became liable thereunder in the penal sum of 3336*l.* if the defendant should not well and truly administer the estate according to law.

At the time of her death the intestate was entitled to a one-fifth share in certain house property at Glasgow which she had derived from her husband by a gratuitous conveyance

in his lifetime, parts of which property were subject to Scottish bonds or dispositions in security for securing the principal sums of 3400*l.* and 2900*l.* respectively.

The opinion of an eminent counsel of the Scottish Bar was taken by the plaintiff Harris on behalf of the defendant as to the personal liability of the late Mrs. Anderson-Berry in respect of the mortgages on the Scottish properties and, in February, 1927, he was advised that she became primarily and personally liable up to the full value of the mortgaged properties and, in March, 1927, he was further advised that, if her co-owners of those properties should fail to contribute their shares of any deficiency, her administrator would be liable for any such deficiency beyond Mrs. Anderson-Berry's one-fifth share in the properties; but that the total liability was limited by the value of the succession taken, and that the liability having arisen from the personal obligation of the author, it was immaterial whether it was constituted by one bond or by several, and that, therefore, the measure of that liability was the total value of the intestate's succession.

In a letter to the defendant dated February 14, 1927, Harris, referring to Mrs. Anderson-Berry's personal liability for the bonds on the Scottish properties in which she had a one-fifth share, enclosed a copy of the questions submitted to counsel and a copy of his opinion; and he wrote: "I think, having regard to the danger of the property being condemned, we should press Mrs. Berry's co-owners to concur in a sale, if the property can be sold for sufficient to clear the mortgages, and I hope there may be no ultimate liability. In the meantime, I suggest that you cannot divide the estate and that the net amount thereof should be ascertained and put on deposit in your name." And on March 7, 1927, a copy of counsel's further opinion was sent to the defendant.

In a letter dated March 17, 1927, Harris wrote to the defendant enclosing an account showing a credit balance in hand of 1576*l.* 4*s.* 1*d.* and suggesting that the costs should be made out, approved by defendant and debited and the balance placed on deposit at the Westminster Bank; and he added: "I cannot advise the distribution, having regard to

C. A. 1927 ANDERSON-BERRY, *In re.* HARRIS *v.* GRIFFITH.

Mr. Chree's opinion with regard to the liability of the estate to make up a deficiency for any of the mortgages." On March 30, 1927, the defendant wrote to Harris as follows: "I am sorry I cannot agree with you that the cash you hold on my account as administrator should be placed on deposit for an indefinite period and after reading the report of the surveyor I see no reason why the money should not be distributed at once which course, acting as administrator I propose to take."

On March 31, 1927, Harris again wrote to the defendant regretting that he was unable to advise him to make any distribution of the estate until the question of the final liability, if any, in regard to the mortgages had been ascertained, and reminding him that he had entered into a bond with two sureties for the due administration of the estate, and that the first duty of an administrator was to discharge liabilities before making any division amongst beneficiaries. And on April 2, 1927, Harris wrote that he proposed to put the money on deposit at the Westminster Bank, Bloomsbury branch, in the joint names of the defendant and his two sureties, if the defendant would consent to that course. To that letter the defendant replied on April 14, 1927, insisting that he was administrator and also trustee of the estate, and requesting that a cheque should be sent to him for the amount or the money paid to his private account at a bank indicated. Again on April 25 the defendant wrote requesting a cheque at once, and saying that he did not see why counsel's opinion should be taken before handing over to him the cash which Harris held for him personally, as he, the defendant, was personally responsible for its distribution to the proper persons.

On April 27, 1927, the firm of solicitors acting for the defendant wrote him a letter in which they reminded him of the opinion of counsel and of the outstanding claims for legacy duty, the amount of which could not be ascertained, until the actual payment, if any, of the contribution towards any deficiency on the mortgages was settled, and pointing out that his threat to distribute the amount in their hands amongst the next of kin would leave the sureties under the

administration bond in a serious position. And the letter proceeded as follows: "In these circumstances your sureties have been advised to institute proceedings and to ask for administration of the estate by the Court and the appointment of a receiver of the moneys now held by us. We are anxious to save the estate expense if possible and if you are willing to agree to the money being placed on deposit in the joint names of yourself and your sureties with a view to its being applied in due administration of the estate and will agree to the costs and expenses (which of course at present are small) being paid out of the estate we are willing to suspend proceedings." On the same day the defendant replied, still insisting that the money ought to be in his possession, as he was the person responsible as trustee.

Accordingly a writ was issued claiming (1.) an injunction restraining the defendant from administering the estate otherwise than according to law and in particular from distributing the estate without first discharging the liability of the estate under the two Scottish bonds and dispositions in security for 3400*l.* and 2900*l.* and dated respectively November 11, 1856, and May 31, 1860; (2.) a receiver and administration by the Court.

Upon the motion coming on on May 27, 1927, it was arranged between the parties that the defendant should effect a policy of assurance to cover the liability to which the plaintiffs as sureties were subject. A policy was accordingly taken out which in the opinion of the Court afforded adequate protection to the plaintiffs. On July 1, 1927, the motion again came before the Court, when it was agreed to be treated as the trial of the action, the sole question to be determined being how the costs of the action and of the motion should be borne.

Sir Thomas Hughes K.C. and *L. F. Potts* for the plaintiffs. The defendant threatens to do an act in the course of his administration which contravenes his duty under the bond, and the plaintiffs, who joined in the bond as sureties, are in the circumstances entitled in a quia timet action to the

C. A. 1927 ANDERSON-BERRY, *In re* HARRIS *v.* GRIFFITH.

protection of the Court. Relief was refused in *In re Ledgard* (1) because there was no threat not to pay the death duties and no evidence to lead to the suspicion that they would not be paid; there was no accrued liability for which the bondsmen could be held liable. Here there is an accrued liability upon the defendant to pay under the mortgages for which provision ought to be made. In *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (2) there was an actual accrued debt and the Court gave the surety relief. In *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.* (3) the action was merely quia timet; it was an attempt to enforce an indemnity before the damage had accrued which gave rise to the right to be indemnified. In *Lloyd* v. *Dimmack* (4) relief was granted to the assignor of a lease in respect of breaches of covenants in the lease already committed. It is submitted that where a principal was threatening to spend money in his hands as administrator, the Court would interfere to protect the estate at the suit of a creditor and that a surety for the administrator would be in the same position. It is not disputed that a surety cannot enforce his right to be indemnified where the time for payment has not arrived and the surety has not been damnified or is not in evident danger of being so, or unless a distinct agreement can be proved that the money shall be paid whenever the surety should call upon the principal to pay: *Dale* v. *Lolley.* (5) It is the duty of an administrator to keep money with which to meet a legacy when the time for payment arises: *Dobbs* v. *Brain.* (6) It was no answer to the surety to say that when the time for payment of the debt arrived the defendant would be in a position to pay it. It is not essential that there should be a demand for payment by the creditor in order to entitle a surety to relief: it is enough that the debt has become payable: *Lord Ranelaugh* v. *Hayes.* (7) A contingent debt would be in a different position. Here there exists, according to the evidence, an actual liability to pay the

(1) [1922] W. N. 105.
(2) [1909] 2 Ch. 401.
(3) (1882) 22 Ch. D. 561.
(4) (1877) 7 Ch. D. 398.
(5) (1808) Note to *Nisbet* v. *Smith*, 2 Bro. C. C. 582.
(6) [1892] 2 Q. B. 207.
(7) (1683) 1 Vern. 189.

mortgages enforceable by the mortgagees in an English Court.

Preston K.C. and *F. W. Beney* for the defendant. The plaintiffs fail to show sufficient cause of action: they come under no liability, until the defendant should make default in paying off the Scottish mortgages. There was on April 27 nothing amounting to a threat to distribute without first providing for the mortgage liability, and there is no sufficient evidence to lead the Court to suspect that such liability would not be provided for: *In re Ledgard.* (1) Even assuming there was such a threat, the plaintiffs were not entitled to bring this action unless they could show (and they could not) that there was an actual accrued debt in respect of which the defendant, as principal debtor, was then liable to be sued: *Morrison* v. *Barking Chemicals Co.* (2) There is no authority for a mere action quia timet by one who has undertaken a position of responsibility for another entitling him to an indemnity, before the right to be indemnified has accrued: such an action will not lie before damage has accrued which gives rise to the right to be indemnified; per Fry J. in *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.* (3) There is no evidence here that the defendant will not be in a position to pay when called upon or that the sureties are in any peril of being made liable. No demand has been made by the creditors either upon the defendant or the sureties: a demand for payment being essential to entitle the plaintiffs to the relief they claim: *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (4); *Bradford* v. *Gammon.* (5)

CLAUSON J. [having stated the facts and read the correspondence which passed between the plaintiff Harris and the defendant, proceeded:] That leaves as the first point to be decided, the question whether in fact, at the moment of the issue of the writ, the plaintiffs were justified in regarding the conduct of the defendant as amounting to a

(1) [1922] W. N. 105.
(2) [1919] 2 Ch. 325, 331.
(3) (1882) 22 Ch. D. 561.
(4) [1909] 2 Ch. 401.
(5) [1925] Ch. 132.

C. A. 1927

ANDERSON-BERRY, *In re.* HARRIS *v.* GRIFFITH.

Clauson J.

threat to commit some act in contravention of the bond he had entered into that he would well and truly administer the estate. I am satisfied upon the evidence that the defendant was threatening and was persisting in his intention to administer the estate in contravention of his bond to administer well and truly by distributing the moneys in question amongst the next of kin of the intestate without first providing against the liability to which the estate was subject under the Scottish mortgages. The next question is whether in these circumstances the plaintiffs are entitled to come to the Court for protection? The answer to that question must depend upon the nature of the rights of the plaintiffs as sureties under the administration bond into which they entered. In such circumstances as the present any ordinary creditor, including, in my opinion, a Scottish creditor under the mortgages, would clearly have a right to the assistance and protection of the Court in the administration of the estate. I am further of opinion that, on principle, the sureties in this case should be placed in at least as favourable a position as any ordinary creditor of the estate. There can be no doubt that in a case of an actual breach of duty committed by an administrator the Court would, at the suit of a party interested, interfere to protect the estate.

Granted that the plaintiffs had reasonable grounds for anticipating a breach of duty on the part of the administrator, I can see no reason, on principle, why this Court should not, in proceedings taken quia timet interfere to protect the plaintiffs as sureties against liability under their bond. It was contended that, upon a study of the cases, where a surety has made himself liable for the payment of moneys, it appears that the mere fact of the relationship of principal and surety is not in itself enough to justify interference by the Court, but that it is necessary to prove a reasonable anticipation that the surety is in peril; and it was suggested that where the administrator is a person of substance, the Court will be slow to interfere with his administration at the instance of his surety. But here the defendant threatens

to distribute the moneys in question amongst the next of kin, and persists in that threat down to the issue of the writ in this action. In those circumstances, in my judgment, the plaintiffs had reasonable grounds for anticipating a breach of duty on the part of the defendant with resulting jeopardy to themselves, and accordingly were justified in applying to the Court, quia timet, for protection.

The motion is, by consent, being treated as the trial of the action. In that action, in my judgment, the plaintiffs would have succeeded in obtaining the relief which they claimed, but for the arrangement come to between the parties to effect an insurance against the liability of the plaintiffs. The defendant will therefore be ordered to pay the costs, and it is agreed that the costs should include the premium paid in respect of the policy effected under the arrangement made for insurance.

H. C. H.

C. A. The defendant appealed. The appeal was heard on Dec. 1, 1927.

Preston K.C. and *F. W. Beney* for the appellant. The whole case of the plaintiffs rests on the defendant's letter of March 30, which we admit was an incautious letter, but did not by itself justify bringing the present action. There is no general equity to require the Court to intervene to protect the interests of a surety: *In re Ledgard* (1), a decision of Eve J., which we submit is indistinguishable from the present case. A surety has no right to seek the aid of the Court until there is an accrued or ascertained liability.

[LAWRENCE L.J. You mean until there has been a misapplication.]

Yes, a surety cannot bring a quia timet action: *Antrobus* v. *Davidson* (2); *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.* (3) In these cases a claim to an indemnity was held premature. In the latter case Fry J. declined to follow *Lord Ranelaugh* v. *Hayes*. (4)

(1) (1922) 66 Sol. J. 405.
(2) (1817) 3 Mer. 569.
(3) 22 Ch. D. 561.
(4) 1 Vern. 189.

C. A. 1927

ANDERSON-BERRY, *In re.* HARRIS *v.* GRIFFITH.

[LORD HANWORTH M.R. That case is referred to as an authority in the text-books: Mitford on Pleading, 5th ed., p. 172.]

Ascherson v. *Tredegar Dry Dock and Wharf Co.* (1) In *Morrison* v. *Barking Chemicals Co.* (2) the plaintiff relied on *Ascherson's* case (1), and it was distinguished on the ground that there the guarantee had come to an end, and the amount due had been ascertained.

The nearest case perhaps to the present is *Wooldridge* v. *Norris* (3), where however the plaintiff had been called upon to pay.

The learned judge never stated in his judgment the principle on which he granted relief, but said there was no reason in principle why he should not do so. There is no case of jeopardy here, but merely a threat by the administrator to do something which he was, at the moment, not justified in doing. The plaintiffs could not ask for a receiver of money which was in the hands of their own firm as solicitors for the administrator, and they had no right to an injunction, as the property did not belong to them. To justify a quia timet action it must be shown that the property sought to be protected is in imminent danger.

Sir Thomas Hughes K.C. and *L. F. Potts* for the respondents were not called upon.

LORD HANWORTH M.R. This is an appeal from a decision of Clauson J. who, on a motion made in the course of the action, by consent treated it as the trial of the action and made an order the effect of which was that the plaintiff secured relief and was awarded the costs of the action. I say that because the particular relief which was secured was alternative to some other relief which might have been given at the direction of the Court, but was adopted by the parties, and wisely adopted, on the suggestion of the learned judge. But the appeal comes before us on the ground that Clauson J.'s intervention in the action with its consequent results and an

(1) [1909] 2 Ch. 401. (2) [1919] 2 Ch. 325, 331.
(3) (1868) L. R. 6 Eq. 410.

order against the defendant to pay the costs of the trial was unwarranted, because the plaintiff, at the time he was before the learned judge, had no right to bring his suit or to ask for the intervention of the Court.

The case arises in this way. On December 13 of last year Mrs. Gertrude Anderson-Berry died. She was the widow of a doctor, and had up to the date of her death enjoyed the income of some property which had been settled upon her. That property was situated in Glasgow and was what might be called small house or shop property. The gross income from that property was some 3000*l.* a year; but its nature is illustrated by the fact that a very large amount had to be spent upon repairs. There were a number of outgoings and the net income from it, after interest on certain mortgage bonds had been defrayed, was not more than 500*l.* a year. Mrs. Anderson-Berry was entitled to one-fifth of the net annual income, and that amounted to approximately 100*l.* a year. That property had been settled upon her in the year 1888—I suppose at the time of her marriage—and the property was subject to two mortgage bonds: one dated November 11, 1856, and the other May 31, 1860. There were, I think, in all three mortgage bonds on some property; but the mortgage bonds which we have to consider in this case total up to the sum of 6600*l.*, and are for two separate amounts.

It appears that, according to the law of Scotland, which is not disputed, there is what might be called a personal covenant on the part of the mortgagor to defray the amount due, and that the amount due, or, rather, the liability, is estimated in a particular way. The value of the property is considered as at the time when it was settled and the lady first came into possession of it, which was in 1888; and the Scottish Courts would ascertain the amount that she would receive quantum lucratus, i.e., the amount by which she would benefit by the receipt of the income of this property, and to the extent to which she has been advantaged there is apparently a liability upon her and upon her estate to make good any deficiency which is discovered at the time when the mortgage money is required to be paid and if the mortgaged

C. A. 1927

ANDERSON-BERRY, *In re.* HARRIS *v.* GRIFFITH.

Lord Hanworth M.R.

property fails to release sufficient to defray the mortgage money.

When therefore she died in December last her estate was in peril of having to make good a sum in respect of these mortgages if the mortgaged property was insufficient to meet the sum required. As I have said, the property is of a poor nature; and, more than that, it is of such a poor nature that it is in danger of an order being made for its clearance, when it would be cleared away without compensation in consequence of its present condition.

From the materials that are before us it is plain that the property is of such a nature that although its value as valued by what is called in Scotland a valuator might be estimated at sufficient to pay the mortgage money, yet it is impossible to overlook the prospect that a demand might be made upon the estate of the late Mrs. Anderson-Berry to make good the deficiency quantum lucratus. Now, after her death it was discovered that she had died intestate, and so an application was made for letters of administration to be issued to her brother, Mr. Murray Griffith. He is, we understand, a gentleman of position; a well known member of the Stock Exchange; a business man, and of good position and substance. Letters of administration were granted to him on January 20, 1927, but before he was able to get the grant completed to him he had, as every intending administrator has, to enter into a bond with the registrar of the Probate, Divorce and Admiralty Division, and to secure two others to act in effect as between him and them as sureties; but as between themselves and the Court the registrar has proposed, for the due performance of the duties, an administrator, Mr. Murray Griffith. That bond is dated January 7, 1927, and by that bond both Mr. Murray Griffith and the plaintiffs Mr. Henry Harris and Mr. Edwin Barr, are jointly and severally bound as proposed to the registrar in the sum of 3336*l.* for the due administration of the estate. In particular, one of the conditions of the bond is that the administrator in the said estate will well and truly administer according to law. For that due administration

according to law both Mr. Harris and Mr. Barr are directly responsible upon the bond to the Court. Mr. Harris is a member of a firm of solicitors who carry on business at 53 Russell Square. That firm apparently acted for Mrs. Anderson-Berry and were acting for Mr. Griffith, the administrator, in relation to the estate. We have had a number of letters read to us. It is important, however, that I should refer not to all of them but to one or two of them. It appeared that putting together the moneys of which Mrs. Anderson-Berry was possessed at the time of her death, some moneys in her bank on deposit and on current account, it was found that there was a credit in her favour of 1576*l*. Information to that effect was given to Mr. Murray Griffith on March 17 of this year by a letter, and the letter continues after giving the information: "I cannot advise the distribution having regard to Mr. Chree's opinion with regard to the liability of the estate to make up a deficiency for any of the mortgages." We are told that the beneficiaries who would take a portion of this fund upon the distribution are four brothers and sisters of Mrs. Anderson-Berry including Mr. Murray Griffith. It is clear, however, that at the same time that this fund was ascertained to exist up to the amount of which notice is given to Mr. Murray Griffith he was informed that his solicitors could not advise any distribution, because the gentleman named in this letter, who is a distinguished King's Counsel practising at the Scottish Bar, had advised that there was a liability which might mature in respect of these mortgage bonds to which I have referred. A letter or two passed, but on March 30 Mr. Griffith writes this letter: "I am sorry I do not agree with you that the cash you hold on my account as administrator should be placed on deposit for an indefinite period, and after reading the report of the surveyor I see no reason why the money should not be distributed at once, which course, acting as administrator, I propose to take."

Mr. Preston has said it must be borne in mind that Mr. Griffith is a layman; that he did not appreciate fully what his duties were as administrator; but Mr. Griffith is

C. A. 1927

ANDERSON-BERRY, *In re.* HARRIS *v.* GRIFFITH.

Lord Hanworth M.R.

a business man of good standing and good repute, and I am quite sure that he knew what his words meant in that letter. He may know, and well know, what a risk is; and it is plain from the sentence I have read that although the surveyor had communicated the fact that the property might not, if sold, realize sufficient to pay off the bond, with the consequence that there would be a deficiency to make up, yet he says: "I see no reason why the money should not be distributed at once which course, acting as administrator, I propose to take." I should read that letter rather in this light, that Mr. Griffith, being a man well able to stand a small liability in reference to a sum like 1500*l.*, or the amount required to make up the deficiency, was prepared to take such risk as was involved, and, if necessary, to replenish the sum required from his own resources, which were abundant. To that Mr. Harris replies on March 31: "I regret very much that I am unable to advise you to make any distribution of the estate until the question of the final liability, if any, of Mrs. Anderson-Berry in reference to the Glasgow mortgages has been ascertained." And not unnaturally Mr. Harris continues: "I must therefore ask you to be good enough to accept my advice in the matter."

Then a suggestion is made, if it had not been made before, that the money should be paid over into a bank to be held in the three names of the two plaintiff bondsmen and the defendant, Mr. Murray Griffith. On April 2 Mr. Harris writes back. [His Lordship read the letter.] Pausing there for a moment, it is clear that Mr. Harris made a sensible suggestion: Let us put the money in the names of the three persons who are interested, one as principal administrator, the other two as sureties, and let us bear in mind, as I am bound to remind you, that there is a possible liability on the mortgages, and, more than that, there is a claim, if the mortgaged property has a value to the estate, against you for legacy duty in respect of it. After that some letters passed, and the solicitor, or I suppose it is the writer to the signet in Scotland, wrote to the solicitors and said: "We fear that this property in Glasgow could not be sold at a price

sufficient to pay off the mortgages." That is a clear indication that there will be a deficiency to be made up out of the estate.

Then on April 14 Mr. Griffith, by this time apparently somewhat annoyed, writes a letter. To that, on the 14th, there is a reply suggesting that the matter should be left in abeyance; but on April 26 Mr. Harris received what I shall call a final letter from Mr. Griffith to this effect. [His Lordship read these letters and proceeded:] Taking the purport of the letters to which I have referred together, it is plain beyond any question to my mind that Mr. Griffith at that time was asking, and indeed insisting, upon the cheque being handed over to him personally or that the money should be placed in his own private account; that he rejected the course suggested that the money should be put into the names of himself and his bondsmen and that the purpose for which he required the money to be paid over was its distribution, for which he was responsible, and that he was prepared to say that, whether there was a liability on the Glasgow property or not, he was ready and able to take that risk and that his judgment ought to prevail in the matter.

Now, upon that, in spite of the point Mr. Beney makes that after the letter written on April 26 it might have been supposed there would be a delay before the writ was issued, I think that, as soon as the plaintiffs had received the letter which appears in our file as dated April 25, they were justified in taking whatever action they could to protect themselves on the ground that there was a danger of this money being claimed and, if handed over, being used by Mr. Murray Griffith in the way in which he had expressed his intention—that there was a danger of that distribution being imminent and immediate and that there was clear evidence that if that was done the estate would be depleted and there would be substantial damage to it, and that if that course was adopted by Mr. Griffith there would not be a fulfilment of the conditions of the bond that Mr. Griffith would well and truly administer according to law.

What was the position of the administrator at that time? He had not reached the point at which the estate was ripe

C. A.
1927
ANDERSON-BERRY, *In re.*
HARRIS *v.* GRIFFITH.
Lord Hanworth M.R.

for distribution; no finality had been reached as to the debt payable by the estate; if the property was of little value, as was feared, there was a direct liability in respect of the deficiency. If the property was of such value as to leave a margin beyond the mortgage debt, there was legacy duty immediately payable. It could not be contended by any one who was accustomed to the administration of an estate that on April 27 the administrator was minded well and truly to administer according to law, for he was prepared to hand over the moneys to the beneficiaries entitled in the distribution and leave the estate bare of cash, and that at a time when he was warned and advised that there were liabilities still outstanding and not yet determined. It seems to me plain that on April 27 Mr. Murray Griffith's duty towards the Probate Court was to hold the estate, and that his intention had been unequivocally expressed that he intended to misapply the estate if it was placed in his hands.

The writ was issued on April 27. It is said that at that time the bondsmen, who are the plaintiffs, had no right at law or in equity to take any steps at all against Mr. Murray Griffith. It is not contested by Mr. Preston that there is a right on the part of the surety to exoneration by his principal, and that as soon as any definite sum of money has become payable to the creditor, the surety has a right to have it paid by the principal and his own liability in respect of it brought to an end. But it is said that that right only arises as and when a definite sum of money has become payable. I think that is too narrow a view. I think that from the cases which have been cited there is a right of the surety to ask that he should be protected from a cloud that hangs over him if and when it is quite clear there is a cloud hanging over him, and if there is a liability, even though the amount of that liability will be ascertained in subsequent proceedings, I think the surety has a right to ask for protection. There is the liability, quantified though it may be by subsequent proceedings and at a subsequent date; but once the liability has appeared then I think the right of the surety has accrued.

Up to that moment the two plaintiffs were bondsmen for the due administration according to law of this estate. In certain events there was clearly a liability to legacy duty; in other events there was a clear liability for the deficiency upon the property; and I think it would be a negation of the due and just appreciation of the facts to say that on April 27 the bondsmen were not in imminent and serious peril. It is true they would be able to recover, or to ask Mr. Murray Griffith to repay the money if he wrongly distributed a portion of the estate—and let me accept that he could do so—but that is not the duty of the bondsmen. They are to see that the estate is properly administered; and the estate must not be dissipated, even if there would be no difficulty in replacing funds improperly distributed. To well and truly administer according to law means to distribute properly and not to distribute improperly and afterwards replace.

I need not refer in detail to many of the cases to which reference has been made, but I think the case of *Simmons* v. *Bolland* (1) is an illustration of what has been done, and what ought to be done, in similar cases. There it was determined by the Court that it would give protection to the executor by giving him a security in case of his being made liable in respect of a future breach of covenant; and the same good sense which applied in that case seems to my mind to have been exercised by Clauson J. in the present case.

The only other case to which I wish to refer is *Wooldridge* v. *Norris* (2), where the learned judge held that the surety though he had not actually paid anything was entitled to maintain a bill against the executors for payment of the debt and indemnity. I am not going through a number of cases, but I will add that in a case to which we have been referred, *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.* (3), some doubt was thrown by Fry J. on the case of *Lord Ranelaugh* v. *Hayes*. (4) I do not think it is true to hold that the learned judge cast doubt upon the case, and it was

(1) (1817) 3 Mer. 547.
(2) L. R. 6 Eq. 410.
(3) 22 Ch. D. 561, 564.
(4) 1 Vern. 189.

C. A. 1927 — ANDERSON-BERRY, *In re.* — HARRIS *v.* GRIFFITH. — Lord Hanworth M.R.

referred to in a later case, *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (1), by Swinfen Eady J. (as he then was), and he referred to the very passage.

Having regard to the cases which have been cited and to the view I take of the facts it seems to me that Clauson J. was quite right. It is said that this is a quia timet action. Be it so. But that, I think, is a course of procedure which prevents the Court from allowing its action to be stultified. It seems to me the Court is being asked, although it has before it clear facts which will end in loss or damage occurring to one party, not to grant immediate relief which would have the effect of safeguarding the interests of all parties.

In the present case, upon the view of the facts that I take, I think the plaintiffs were entitled to come to the Court, because Mr. Murray Griffith had made it plain that he was not administering, or intending to administer, the estate well and truly and according to law. They were entitled to sue quia timet and upon that clear and definite attitude of Mr. Murray Griffith to ask and to invoke the assistance of the Court. The appeal, therefore, must be dismissed with costs.

SARGANT L.J. I am of the same opinion. As regards the question of fact I entirely agree with what has fallen from my Lord, and I have come, like him, to this conclusion, that at the date when the writ was issued Mr. Murray Griffith had deliberately intimated to the plaintiffs that he intended to distribute the fund amongst the five beneficiaries without paying attention to the necessary provision for liabilities that were hanging over the estate. I think it is impossible to read the correspondence without seeing that he was claiming the right to receive from his solicitors this sum of 1700*l.* odd and to use his position as administrator, and as the sole person entitled to decide what should be done, for the purpose of making this distribution.

That being so, what was the position of the sureties? Were they bound to wait until the wrong had been done

(1) [1909] 2 Ch. 401.

and then bring their action against the administrator to have the wrong put right? It seems to me clear that, if the administrator had paid over the money in the way in which he threatened to pay it, the sureties would have been entitled immediately afterwards, being then under an accrued liability, to bring their action against the administrator for the purpose of having that money replaced. In that state of things I do not think the Court would allow its jurisdiction to be stultified if, when there was a clear threat to do that which would have involved the replacement of the money, the Court should have confessed its inability to prevent the funds of the estate from being applied in this wrong manner. I think the origin of quia timet may be an illustration of the rule that prevention is better than cure, and in a case of this kind the cure may be uncertain. I do not say Mr. Murray Griffith may not have been perfectly solvent; I have not a word to say against him in that respect; but, still, there is not the same certainty that exists if you have the fund itself kept and applied to the purposes for which it is applicable; and it would be unfortunate if the Court was unable to prevent this clear definite wrong being done and had to wait until the wrong had been done and then to give such relief as would in all probability but not with absolute certainty cure the evil results of the commission of the wrong. In such cases as that of *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (1) the jurisdiction which was exercised was to a considerable extent quia timet, because there the position was this, that the five directors of the company had given a guarantee; then one of them died and the bank were quite satisfied to rest on the guarantee. The deceased director had left a large estate and they were perfectly satisfied with his guarantee together with the other guarantees and they were prepared to let the guarantee go on indefinitely. They had ascertained the amount and the result would have been that the company could have gone on trading with the benefit of the guarantee on which this sum of 17,000*l.* had already accrued and it would not have been necessary for the

(1) [1909] 2 Ch. 401.

C. A. 1927 — ANDERSON-BERRY, *In re.* — HARRIS *v.* GRIFFITH. — Sargant L.J.

new directors, or directors who came in, to join in any guarantee to the same extent to which the original guarantor had joined in the guarantee. I only mention those facts, because I was counsel in that case, and I have some special acquaintance with the facts, for the purpose of pointing out that there was no probability at all at that time of the debt of the executors of the testator being due within any measurable distance of time, and yet it was held that they were entitled to come to the Court and get an order on the company to pay the bank, because this cloud should not be left hanging over the estate. That is an instance of quia timet. The case of *Wooldridge* v. *Norris* (1), which is relied on very much by the learned judge in *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (2), was an even clearer case of the application of the doctrine of quia timet. That being so, and the doctrine being applied in cases of guarantee, I think there could hardly be a clearer instance of a case in which that doctrine is applicable, because here there is a definite fund with a definite threat to apply it to purposes to which the fund is not applicable, and there are persons the sureties to the bond who will come under a definite liability to make that wrong good if and when the wrong is committed. It seems to me that all the features are present in such a case which render the jurisdiction of the Court to prevent the commission of the wrong applicable. I think, therefore, that Clauson J. was quite right in the view which he took, and that this appeal should be dismissed.

LAWRENCE L.J. I agree. Mr. Preston has relied on two grounds in support of the appeal. First, that this action being quia timet was premature, as the threat to do the wrongful act did not continue down to the issue of the writ. On that point my Lord has said all that there is to be said. I understand that Mr. Griffith made an affidavit stating that he had changed his mind after March 31, 1927. If that be the fact, it is, to say the least, unfortunate that he did not inform Mr. Harris of his change of mind. In the absence

(1) L. R. 6 Eq. 410. (2) [1909] 2 Ch. 401.

of such information, I think that the plaintiff was fully justified in issuing the writ. Secondly that, in the present case there was no right to bring a quia timet action at all; and in support of that proposition Mr. Preston has cited a number of cases. In my opinion, these cases are inapplicable to the facts of the present case. Here what was guaranteed was not the payment of a sum of money (which might or might not become payable according to what arrangements the principal debtor might make with his creditor), but the due administration according to law of a particular fund, and the act which was about to be committed was the maladministration of that fund—an act which the surety had guaranteed should not be done. In such a case I think the surety is entitled to bring an action before the act has been done; if the action had been brought merely to get a principal debtor to discharge a debt of his own, it may very well be that the circumstances would have to be very special before such a quia timet action would be held to be justified; but, as my Lord has pointed out, even in such cases quia timet actions have been entertained. In a case like the present, however, I think the Court ought not to hesitate to protect the surety from the liability which would immediately and inevitably accrue if the wrongful act were done.

I agree with Clauson J. in the view that he has taken, and think this appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *Peachey & Co.; Ford, Lloyd, Bartlett & Michelmore.*

H. L. L.

ASTBURY J.
1928
Jan. 17.

GRANT *v.* KNARESBOROUGH URBAN DISTRICT COUNCIL.

[1927. G. 920.]

Rates—Rateable Value—Licensed Premises—Form of Return—Requisitions for gross Takings and Outgoings—Invalidity—Action for Declaration—Withdrawal of Defence—Right of Plaintiff to proceed to Trial and prove Invalidity—Costs—Rating and Valuation Act, 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 40—*Rating and Valuation Act* (*Returns*) *Rules*, 1926.

In March, 1927, the defendants for the purpose of making a new valuation list under the Rating and Valuation Act, 1925, s. 40, served a notice on the plaintiff requiring him to make a return of certain particulars including " gross takings and outgoings " of his licensed premises and other particulars not contained in the Schedule, Part II., of the Rating and Valuation Act (Returns) Rules, 1926.

On April 27, 1927, the plaintiff commenced this action for a declaration that the form of return required was illegal, unauthorized and ultra vires.

The defendants thereupon withdrew all their notices, but later on put in a defence denying their invalidity. The action was then set down for trial, but shortly after the defendants withdrew their defence by leave, stating that they did not propose to contest the action any further.

As the plaintiff wanted a declaration as to the invalidity of the form of return under the Act, for which purpose both evidence and argument were required, he did not move for judgment in default of defence, but proceeded to trial and called evidence to prove that the offending requisitions were not " reasonably required for the purpose of carrying out this Act " within the meaning of s. 40 :—

Held, on the evidence, that the plaintiff had proved his case and was entitled to the declaration he claimed.

Held, also, that as the plaintiff could not have obtained a declaration of this nature on a motion for judgment in default of defence, without evidence, and as he was clearly entitled to the declaration at the date of the writ, subject to his substantiating his case by proper evidence, he was entitled to proceed to trial for this purpose and obtain his declaration with costs.

Dyson v. *Attorney-General* [1912] 1 Ch. 158 applied.

Witness Action.

The plaintiff was the licensee and occupier of licensed premises—namely, the Golden Anchor Inn, Knaresborough. The defendants were the rating authority for the district.

In March, 1927, the defendants for the purpose of making a new valuation list under the Rating and Valuation Act,

1925, served a notice on the plaintiff requiring him to make a true and correct return of certain particulars therein set out.

The notice dated March 25, 1927, was in the form settled by the Minister of Health under s. 58 (see Rating and Valuation Act (Returns) Rules, 1926 (St. R. & O., 1926, No. 795, p. 1368)), but the particulars asked went far beyond the particulars authorized by the Schedule, Part II., of those Rules.

The last three requisitions were as follows :—

11. Gross takings for the last three years.

12. Outgoings for the last three years ; tenant's remuneration ; wages and equivalents ; breakages and depreciation ; lighting, heating, etc.

13. Tenant's capital.

On April 27, 1927, the plaintiff commenced this action for a declaration that the form of return required was illegal, unauthorized and ultra vires, that the plaintiff was not under any obligation to comply with the requisitions of the said form or any of them, and was not liable for penalties for non-compliance.

In his statement of claim delivered May 20, 1927, the plaintiff alleged that the form of return was illegal, unauthorized and ultra vires in that by including requisitions 11, 12, 13 it included :—

(*a*) Requisitions for particulars not reasonably required for the purposes of carrying out the provisions of the 1925 Act.

(*b*) Requisitions in excess of and inconsistent with the requirements laid down in the 1926 Rules.

(*c*) Requisitions constituting an unreasonable and oppressive inquiry into the profits made by an occupier in the course of his business.

(*d*) Requisitions as to tenant's remuneration and tenant's capital the answers to which must be based solely on estimates, hypotheses or opinions which were not matters of fact.

Shortly after service of the writ the defendants withdrew all their notices, but on November 1, 1927, they put in a statement of defence denying that the form of return was in

ASTBURY J. 1928 GRANT v. KNARESBOROUGH URBAN COUNCIL.

any way illegal, unauthorized or ultra vires, and submitting that the Court in its discretion ought not to make the declaration asked for, but that the plaintiff should be left to establish his defence (if any) before the magistrates if and when the defendants took proceedings under s. 42.

On November 3, 1927, the action was set down for trial. On November 16 the defendants applied for leave to withdraw their defence, and on November 22 leave was given and the defence withdrawn, the defendants stating before the Master that they did not propose to contest the action any further.

As the plaintiff wanted a declaration, as to the invalidity of the form of return under the Act, for which purpose both evidence and argument were required, he did not move for judgment in default of defence, but proceeded to trial and called three experts to prove that requisitions 11, 12 and 13 were not "reasonably required for the purpose of carrying out this Act" within the meaning of s. 40.

The defendants did not cross-examine or contest this point, but submitted that the plaintiff could have got all the relief he was entitled to as between himself and the defendants, on motion for judgment in default of defence, and if he wanted to establish his right to an actual declaration by the Court, it was a luxury for which he must pay.

Norman Birkett K.C. and *E. H. Tindal Atkinson* for the plaintiff. Sect. 40, sub-s. 1, of the Rating and Valuation Act, 1925, provides that where a new valuation list is to be made for any rating area the rating authority shall serve notice on the owner, occupier or lessee of every hereditament therein, requiring him or them to make a return containing "such particulars as may be reasonably required for the purpose of carrying out this Act." I shall call experts to prove that the particulars asked by requisitions 11, 12, 13 are not reasonably required for that purpose.

J. V. Nesbitt for the defendants. I do not know where we are. I have withdrawn my defence and stated that I did not propose to contest the action further. I thought that was an end of the matter.

[ASTBURY J. The plaintiff is asking for a declaration as to the invalidity of a form issued by the defendants under their statutory powers. I could not make that declaration without hearing argument and evidence, merely because you have withdrawn your defence, and don't contest the case.]

J. V. Nesbitt. As between myself and the plaintiff the invalidity is now admitted. I shall therefore neither cross-examine nor argue on that point. But on the question of costs I shall submit that as between myself and the plaintiff this trial is wholly unnecessary, and the plaintiff could have got all he was strictly entitled to against me on motion for judgment in default of defence. If he wants to establish his right to a general declaration of invalidity, it is a luxury for which he ought to pay.

Norman Birkett K.C. The question of costs can be argued later, but I want the declaration even if I have to pay for it.

Sect. 58, sub-s. 1, empowers the Minister of Health to make rules prescribing (inter alia) the form of return required or authorized to be used for the purposes of the Act.

The 1926 Rules made under this section provided (r. 2) that the notice requiring the return should be in the form shown in the Schedule, Part I., and the particulars should include questions as to the matters mentioned in Part II. Rule 3 authorized the omission of questions inappropriate in particular cases, but there is nothing to suggest the addition of any other questions at all, still less wholly irrelevant questions.

Now there is nothing about trade returns in Part II., so that it is evident, quantum valeat, that the Minister of Health thought them wholly irrelevant. Tenant's remuneration and tenant's capital are merely hypothetical data for a valuation. They are not matters of fact at all.

If my evidence proves that requisitions 11, 12 and 13 are ultra vires, the whole notice is vitiated: *Dyson* v. *Attorney-General.* (1)

[Expert evidence to the effect stated in the judgment was then called.]

(1) [1912] 1 Ch. 158, 165, 166, 170, 171.

ASTBURY J.
1928
GRANT v. KNARESBOROUGH URBAN COUNCIL.

ASTBURY J. [after stating the facts:] The action has now come on for trial, the plaintiff insisting upon obtaining the declaration he asks. It would have been impossible for the Court to make such a declaration without argument and proof that the return demanded from the plaintiff was one that the defendants were not entitled to require.

The plaintiff has called three witnesses of great experience in the rating world. Mr. Faraday, who has represented over 100 rating authorities and dealt with the assessment of over 10,000 licensed premises, says that the object of this return is to enable the true annual value of the premises to be ascertained. The takings and outgoings are wholly unnecessary for making a proper assessment. They are never demanded, and the answers, if any, obtained would be misleading. Sir H. Trustram Eve, who has dealt with over 9000 licensed premises in this connection, has never known trade returns and outgoings required for the purpose of assessment. He says that the question is what rent as a free house could be obtained. He agrees with Mr. Faraday generally and adds that the tenant's remuneration and capital requisitions are wholly unnecessary and involve a wild guess by the tenant, as distinct from a statement of fact, and that the demand of an answer to such a question is wholly oppressive. Other matters in requisition 12 refer to hypothetical questions of opinion and not fact, and the answers are wholly unnecessary for assessment purposes. Mr. Motion, who has dealt with over 5000 cases under the 1925 Act, agrees that to demand trade returns is unnecessary misleading and oppressive. He also says that an expert might guess a tenant's remuneration and capital, but an ordinary tenant would probably be wholly unable to understand the question and that, when understood, the answer would be opinion, hypothesis, or estimate and not fact, and in no sense requisite for arriving at a true assessment.

Requisitions 11, 12 and 13 do not appear in the Schedule, Part II., of the 1926 Rules, in which no trade return or anything of that character is included. Rule 3 provides that

a rating authority, if they think fit, may in the case of notices served upon the occupiers, owners, or lessees of hereditaments of any particular class omit questions as to any of the matters mentioned in Part II. of the Schedule which appear to them inappropriate to hereditaments of that class, and may in any case "omit" questions as to any of the said matters which appear to them inappropriate to a return to be made by an occupier or, as the case may be, by an owner or lessee not being an occupier.

Nothing is said about adding matters not included in the Schedule, Part II., but it is plain under s. 40, that only such particulars may be demanded as are "reasonably required for the purpose of carrying out this Act." The particulars 11, 12, 13 are neither included in the Schedule, Part II., nor adumbrated by the Rules, and the evidence is conclusive that answers to those requisitions are not reasonably required for the purpose of carrying out the Act. I imagine that the defendants have adopted the same view, as they have withdrawn their defence.

In *Dyson* v. *Attorney-General* (1), the celebrated Form 4 case, the Court expressed a very strong opinion against departing from the region of fact into the region of hypothesis and opinion. They also expressed the view that one of the answers required was not authorized by the Act, that the form was one and indivisible, and that the inclusion of the unauthorized question rendered the whole return inoperative and ultra vires.

The plaintiff has made out his case and is entitled to his declaration. I will now hear the defendants on the question of costs.

J. V. Nesbitt for the defendants. The mere fact that we once served an illegal notice does not give the plaintiff a right to a declaration. If we had withdrawn it before the writ this would be obvious.

As a matter of fact the writ was served on May 2, 1927, and we withdrew the notice on May 6 before entering appearance. The action however went on, in spite of negotiations

(1) [1912] 1 Ch. 158, 165, 166, 170, 171.

ASTBURY J. 1928 GRANT v. KNARESBOROUGH URBAN COUNCIL.

for settlement, and on November 1 we put in a defence justifying the notice. This defence was withdrawn by leave on November 22 on a clear statement that we did not propose to contest the action any further. In these circumstances the Master thought the proper course would be "a consent order staying proceedings on an admission by defendants to the effect of the declaration claimed by the writ." On the withdrawal of the defence the plaintiff could have moved for judgment on those terms, and an order for costs embodying that admission would have been given him all he was entitled to against the defendants.

But he wants more. He wants an actual declaration by the Court that this withdrawn and admittedly invalid notice was ultra vires, so that he can have a reported decision to that effect. This is an unnecessary luxury for which he ought to pay. The proper order would be to give the plaintiff his costs up to the time the defence was withdrawn and such further costs as he would have incurred on motion for judgment in default of defence.

In any case the plaintiff ought not to be allowed the costs of three expert witnesses.

E. H. Tindal Atkinson for the plaintiff. The withdrawal of the defence merely amounted to an admission of the facts alleged in the statement of claim and not to admissions of law. The declaration of invalidity asked involved the construction of the Act and evidence as to the practice. The plaintiff could not have given this evidence on a motion for judgment in default of defence and was bound to proceed to trial: see Annual Practice, 1928, p. 445, "Proof of Plaintiff's Case," being a note to Order XXVII., r. 11. He is entitled to his full costs. The question whether three experts were necessary is for the Court or the taxing officer.

ASTBURY J. The defendants ask that a special order as to costs should be made on the footing that the plaintiff ought not to have brought the case to trial after the defence was withdrawn.

The form objected to was withdrawn a few days after

the writ was issued. Later on however the defendants put in a defence denying the invalidity of the form. They subsequently obtained leave to withdraw their defence and made it quite plain to the plaintiff before the Master that they did not intend to contest the plaintiff's claim any further. They submit that in those circumstances, the plaintiff ought to have set down the action on motion for judgment in default of defence and that although on such a motion he would not without proof have been entitled to his declaration, it would have been sufficient for him if an order had been made that the defendants should pay the costs, they not disputing the plaintiff's right as claimed.

I do not take that view. This is an action asking for a declaration that certain parts of this form were illegal and ultra vires. At the date of the writ the plaintiff was entitled to make out that case. The form was then withdrawn, but afterwards a defence insisting upon its validity was put in. Later on that defence was withdrawn, and the plaintiff had to consider what step to take. He was not bound in the circumstances to move for judgment in default of defence if, on such a motion, he could not obtain the relief he was clearly entitled to. The declaration asked involved evidence as to the invalidity of the form issued under the Act and the Court would not have made a declaration of that nature on a motion for judgment in default of defence without evidence and argument.

In those circumstances the plaintiff was entitled to bring the action to trial and establish by evidence his right to the declaration.

This is a very exceptional case. A form gravely oppressive was served upon the plaintiff. Being so advised he brought an action to escape the oppression of having to answer a number of entirely illegal questions. He was not bound to take any relief less than the full relief he claimed. In those circumstances he was entitled to bring the action to trial and obtain that relief. It is said that he has called too many expert witnesses. That is a matter for the taxing officer. All I do is to make the declaration asked

ASTBURY J. 1928 GRANT v. KNARESBOROUGH URBAN COUNCIL.

for and order the defendants to pay the taxed costs of the action.

Solicitors: *Godden, Holme & Ward; Warwick Williams & Marchant, for J. C. McGrath, Wakefield.*

G. R. A.

ASTBURY J. 1928 *Jan.* 20.

TATTERSALL *v.* SLADEN.

[1927. T. 446.]

Dentist — Registration — Annual retention Fee — Non-payment — Power to remove Name from Register—Dentists Act, 1921 (11 & 12 *Geo.* 5, *c.* 21), *s.* 7.

Sect. 7, sub-s. 1, of the Dentists Act, 1921, by empowering the Dental Board to make regulations as to the form and keeping of the dentists' register and the making of entries and erasures therein, and as to proceedings in connection with removal therefrom or restoration thereto, and prescribing an annual fee for retention thereon, impliedly authorizes the Board to provide for non-retention on, or removal from, the register in default of payment of that retention fee.

Observations in *Patent Agents' Institute* v. *Lockwood* [1894] A. C. 347 considered and applied.

ACTION.

This was in reality a friendly action brought with the view of determining whether the Dental Board were entitled to strike a dentist's name off the dentists' register for non-payment of the annual retention fee, as authorized by the Board's regulations made under s. 7 of the Dentists Act, 1921, or whether their only remedy was to sue for the fee.

The action was in form an action for dissolution of partnership, raising the above question, and the facts were agreed.

By partnership articles, dated November 8, 1926, the plaintiff and defendant, who were both dentists registered under the 1921 Act, agreed to become and continue partners in the profession of dentists for three years from October 1, 1926.

Clause 13 provided that: "If either partner shall at any time during the continuance of the partnership commit any offence under the Dentists Acts, 1878 and 1921 or either of

them or do or omit to do any act or thing whereby he becomes liable to prosecution under such acts or either of them or to have his name erased from the Dentists' Register or to become disqualified or suspended from practising dentistry the other partner may by notice in writing dissolve the partnership whereupon the partnership shall immediately cease and determine accordingly without prejudice to the remedies of the other partner in respect of any antecedent breach of any of the stipulations or agreements herein contained."

The defendant having, after due intimation from the registrar, neglected or refused to pay the annual retention fee for the year 1927 as prescribed by the Board's regulations became liable under those regulations to have his name removed from the register, and his name was so removed on January 18, 1927. He thereby became disqualified from practising dentistry under the Dentists Act, 1921, and liable to prosecution for so doing under the Dentists Acts, 1878 and 1921.

On February 28, 1927, the plaintiff served a notice of dissolution under clause 13, but the defendant denied that the plaintiff was entitled to give that notice. He alleged that the registrar or the Board had no authority to remove his name from the register for non-payment of the retention fee, and that accordingly he was not disqualified from practising or liable to prosecution.

On March 28, 1927, the plaintiff commenced this action for a declaration that the partnership was duly dissolved.

The defendant admitted the non-payment of the retention fee, and the removal of his name from the register, but contended that neither the registrar nor the Board had any power of removing his name for such non-payment.

Maugham K.C. and *Eardley-Wilmot* for the plaintiff. The Dentists Act, 1878, established a dentists' register, in which all persons calling themselves dentists or dental practitioners had to be registered under the penalty imposed by s. 3. But there was nothing to prevent an unregistered person practising

ASTBURY J. 1928 TATTERSALL v. SLADEN.

dentistry if he did not call himself a dentist or dental practitioner: *Bellerby* v. *Heyworth* (1); so that the Act was to a large extent a dead letter. Sect. 12 authorized removal by consent and s. 13 removal for misconduct. Sect. 14 provided for restoration in proper cases, and s. 15 (now repealed) empowered the General Council to make rules in that behalf. Sect. 16 authorized the charging of fees for original registration, but said nothing about any annual retention fee. Sect. 40 provided that all fees under the Act might be recovered as ordinary debts due to the General Council.

The Dentists Act, 1921, s. 2, established a Dental Board, to which the powers of the General Council were transferred by s. 6, and s. 1 forbade an unregistered person to practise dentistry, the register being still the register under the 1878 Act. Sect. 3 provided conditions for admission to the register, and presumably left the old admission fees still in force.

The section really material to this case is s. 7. Sub-s. 1 provides that: "Subject to the provisions of the principal Act and this Act, the Board may make regulations—(*a*) generally with respect to the form and keeping of the register and the making of entries and erasures therein . . . .; and (*b*) with respect to proceedings before the Board in connection with the removal from or restoration to the register of any name; and (*c*) prescribing the fee, not exceeding 5*l*., to be charged in respect of the retention on the register of the name of any person registered after the commencement of this Act in any year subsequent to the year in which that person was first registered; and (*d*) for any other purpose for which regulations are to be made under this Act."

Sub-s. 2 requires the regulations to be approved by the General Council and the Privy Council before they have effect, and sub-s. 3 requires them to be laid before each House of Parliament, either House being authorized to present an address for annulment.

Regulations were made with all the safeguards of this section (see St. R. & O. 1923, Nos. 1615, 1616, 1617, p. 211; 1925, No. 649, p. 235; 1926, No. 799, p. 369), providing

(1) [1910] A. C. 377.

(inter alia) for an annual retention fee of 5*l.* (except for 1927 and 1928, in which it was 4*l.*) and removal in default of payment. This power of removal is impliedly authorized by clause (*c*), as the authorization of an annual fee for retention must imply the correlative power of non-retention if it is not paid.

The case is very analogous to *Patent Agents' Institute* v. *Lockwood* (1), where Patent Agents Registration Rules imposing an entrance fee, annual fee and removal from the register for non-payment of the latter fee were held valid, although the Patents Act, 1888 (51 & 52 Vict. c. 50), s. 1, authorizing the rules did not mention fees at all. The fact that the rules were expressly given statutory effect by the incorporation of s. 101, sub-s. 3, of the Patents Act, 1883 (46 & 47 Vict. c. 57), was not really relied on by the Law Lords.

Sir Thomas Hughes K.C., *J. V. Nesbitt* and *J. R. Butterfield* for the defendant. The Dentists Acts, 1878 and 1921, are penal acts, and must be strictly construed. Under the 1878 Act a registered dentist's name could be removed only by consent or for misconduct. The fee for original registration was payable in advance under s. 7, and probably the restoration fee under s. 14 was similarly payable. If not paid they could be recovered as ordinary debts under s. 40, but there was no power of removal for non-payment.

Where is such a power expressly authorized in the 1921 Act in respect of this newly imposed annual retention fee? The retention fee is not imposed for the protection of the public at all. That is satisfied by the original registration and power of removal for misconduct. The retention fee merely provides additional revenue for the Board to deal with under s. 10, and why should it be enforced by a drastic penal power of removal? It can obviously be recovered as an ordinary debt under s. 40 of the 1878 Act.

Sect. 7, sub-s. 1, clause (*b*), of the 1921 Act, obviously refers to proceedings in connection with removal by consent or for misconduct, and not to removal for non-payment of the retention fee prescribable under clause (*c*). The regulations

(1) [1894] A. C. 347.

ASTBURY J. 1928 TATTERSALL v. SLADEN.

imposing this power of removal clearly go beyond clause (*c*), and are ultra vires.

The observations as to the validity of the rules in *Lockwood's* case (1) were purely obiter. The only decision was that, whether the rules were valid or not, the proper remedy was to sue for the penalty.

The observations, though obiter, are no doubt of very great weight, but they relate to a case where the Board of Trade (the rule-making authority) had practically powers of legislation by proxy. They were expressly directed to make such general rules as were "in their opinion required" for giving effect to s. 1 of the 1888 Act imposing registration on patent agents, and these rules were made statutory by the express incorporation of the provisions of s. 101 of the 1883 Act.

There is nothing of the sort in s. 7 of the present Act. The scope of the regulations is strictly limited by s. 7, which merely provides that subject to the provisions of the 1878 and 1921 Acts the Board may make regulations: (*a*) generally with respect to the form and keeping of the register and the making of entries and erasures therein; (*b*) with respect to proceedings before the Board in connection with removal or restoration; (*c*) prescribing an annual retention fee not exceeding 5*l.*; and (*d*) for any other purpose "for which regulations are to be made under this Act." Any regulations outside this limited scope are ultra vires. They do not receive any imprimatur from having been laid before both Houses of Parliament. (1)

Maugham K.C. in reply.

ASTBURY J. [after stating the facts:] The short point is whether the Board's rules, so far as they confer a power of removal for non-payment of the annual retention fee, are valid or not.

The Dentists Act, 1878, provides (s. 3) that from and after August 1, 1879, a person shall not be entitled to take or use

(1) *Patent Agents' Institute* v. *Lockwood* [1894] A. C. 347: per Lord Morris at p. 366.

the name or title of "dentist" or of "dental practitioner" or any name, title, addition or description implying that he is registered under the Act or that he is a person specially qualified to practise dentistry unless he is registered under the Act. A fine not exceeding 20*l.* for breach is imposed.

That section is now repealed by the Dentists Act, 1921.

Then there are various provisions in the 1878 Act as to how and in what circumstances dentists can be registered; there is a provision for the keeping of the register, and there is a provision that the General Council may from time to time make, and, when made, revoke and vary orders for registration in and removal from the register.

Sect. 16, which is still in force, provides that a person applying for registration before January 1, 1879, is to pay a fee not exceeding 2*l.*; a subsequent applicant is to pay a fee not exceeding 5*l.*

Sect. 40, which also is still in force, provides that all fees under the Act may be recovered as ordinary debts due to the General Council, and all penalties under the Act may be recovered and enforced before the justices of the peace as therein mentioned.

The provisions of the 1878 Act were considerably stiffened by the 1921 Act. Under the 1878 Act a person who paid his registration fee and obtained registration was apparently entitled to remain on the register unless removed by consent or for misconduct. There was no provision for the payment of any annual retention fee.

Then in 1921 for the first time registration is made a sine qua non for practising. The Dentists Act, 1921, provides (s. 1) that no person, unless registered in the dentists' register under the 1878 Act—the principal Act—shall practise dentistry under a penalty not exceeding 100*l.* Then provisions are made as to admission to the dentists' register, as to the effect of registration, and as to the powers of the Dental Board and their registrar.

The present question principally turns on s. 7.

Sect. 7, sub-s. 1, provides that: "Subject to the provisions of the principal Act and this Act, the Board may make

ASTBURY J. 1928 TATTERSALL v. SLADEN.

regulations—(*a*) generally with respect to the form and keeping of the register and the making of entries and erasures therein, and in particular for the registration of the description of persons entitled to be registered by virtue of this Act;"—that is a general power to make regulations with respect to the form and keeping of the register and making and erasing entries—and "(*b*) with respect to proceedings before the Board in connection with the removal from or restoration to the register of any name; and (*c*) prescribing the fee, not exceeding 5*l.*, to be charged in respect of the retention on the register of the name of any person registered after the commencement of this Act in any year subsequent to the year in which that person was first registered; and (*d*) for any other purpose for which regulations are to be made under this Act."

Now clause (*c*) is the first reference to retention on the register after the original year of registration. It authorizes the Board to prescribe a fee not exceeding 5*l.* in respect of that retention.

Sub-s. 2 requires the regulations to be approved by the General Council and the Privy Council; and sub-s. 3 requires them when so made and approved to be laid before each House of Parliament, either House having power to present an address to His Majesty in Council for annulment.

The rules therefore are safeguarded positively by three specific approvals—namely, the Board, the General Council and the Privy Council—and also negatively by the non-disapproval of the Houses of Parliament.

The regulations made and approved as above are in great detail.

Chap. 1, r. 5, provides that when any person entitled to be registered under the Dentists Acts applies to the registrar, the registrar shall on payment of the prescribed fee and on being satisfied that all the Board's requirements have been complied with, forthwith enter in the register the particulars specified in the regulations.

Chap. 9, r. 1, provides that the annual fee payable in respect of the retention on the register of the name of any person

registered after July 27, 1921, accompanied by a signed application to be retained on the register for the following year in the form appended to this chapter, shall be paid so as to reach the registrar at the latest by December 31 of the year preceding the year for which it is paid, and in every case in which the annual fee has not been so paid the registrar shall forthwith after December 31 remove the name from the register.

Rule 2 provides that in every year the registrar shall send to each person registered after July 27, 1921, at his registered address an intimation that the retention fee is payable by December 31, but no omission to send or non-receipt of such intimation shall form any ground for a claim to have retained or replaced on the register a name which has become removable or has been removed under r. 1 of this chapter.

Rule 3 provides that when a name has been removed from the register under r. 1 of this chapter it shall be restored only in accordance with the provisions of chap. 13 of these regulations.

It was under the combined effect of s. 7 and these regulations that the defendant's name was removed from the register for non-payment of his 1927 retention fee, and the question is whether the regulation authorizing that removal is valid.

The defendant admits that a retention fee may be charged, and that if charged it is recoverable. But he contends that the power of removal being a penal or stringent restriction upon his liberty to practise must be expressly authorized by the Act, and rightly points out that there is no such express provision in that behalf.

Before referring to an authority of great weight in this matter I will express my own view as to the fair and reasonable result of s. 7 in empowering the Board to make regulations. They are given an express power to prescribe a retention fee. Being so empowered, they must have an implied right to take the dentist's name off the register if he does not pay his retention fee and become entitled to have his name retained. I can see no other alternative. It is the plain implication of s. 7. In other words I think there is a clear

ASTBURY J. 1928 TATTERSALL v. SLADEN.

intimation in s. 7 that the Board may make regulations, not only prescribing the retention fee, but providing what is to be done if the dentist does not pay the fee entitling him to have his name so retained, and if that is the true construction of s. 7 the defence must fail.

Upon the point of construction the plaintiff relies on *Patent Agents' Institute* v. *Lockwood.* (1) The defendant rightly points out that the speeches on matters relevant to this case were obiter. But they are speeches in great detail, given in no uncertain tone, and directly relevant to the present point.

The Patents Act, 1883, s. 101, sub-s. 1, provided that the Board of Trade might from time to time make such general rules as they thought expedient, (*a*) for regulating the practice of registration under the Act; and sub-s. 3 provided that the rules so made should be of the same effect as if they were contained in the Act and should be judicially noticed. The Dentists Act, 1921, does not contain that provision.

By the Patents Act, 1888, s. 1, sub-s. 1, it was provided for the first time that a person should not be entitled to describe himself as a patent agent unless registered as a patent agent under the Act. That is somewhat similar to the Dentists Act, 1921, s. 1. Sect. 1, sub-s. 2, provided that the Board of Trade should make such general rules as were "in the opinion of the Board required" for giving effect to the section, and it was declared that the provisions of s. 101 of the 1883 Act—as to statutory effect—should apply to rules so made.

There was nothing in the Patents Act, 1888, to suggest that a fee should be paid for registration, or for annual retention. The Board of Trade however made rules providing for the mode of initial entry, the payment of an entrance fee, and the payment of an annual retention fee, and for erasure of the agent's name in default of payment.

That case differs from the present in two respects. First, those rules were given statutory effect by the Act. Secondly,

(1) [1894] A. C. 347.

they were rules "in the opinion of the Board required" for giving effect to "the section," i.e., s. 1 of the 1888 Act.

The House of Lords held quite independently of the 1883 Act, s. 101, sub-s. 3, that the rules were intra vires and valid, although they provided for entrance and annual retention fees, and for the striking off the name of an agent who did not pay the latter.

The relevant portions of the case are in those portions of the speeches where the validity of the rules, independently of s. 101, sub-s. 3, of the 1883 Act, is discussed, the only difference being that in that case the Board of Trade had power to make rules in a form "in their opinion required" to give effect to the section, whereas in the present case the statute, after making very elaborate provisions as to the register of dentists—who may get on and how?—permits the Dental Board to make regulations prescribing an annual retention fee.

I do not propose to read these very long judgments, but Lord Herschell, after drawing attention to the fact that the Board of Trade, for the first time in their rules, instituted these fees and erasure from the register for non-payment of the retention fee, said (1): "I confess that it seems to me, if there were any power to impose fees at all,"—which is clearly the case here—"very difficult indeed to arrive at the conclusion, when the Board of Trade have sanctioned a particular fee, that it is within the province of a Court of law to canvass their conclusion, and to determine what is the legitimate amount at which the fee may be fixed. Such a department as the Board of Trade is very much more competent to determine a question of that description than judges can possibly be, and it would be, I think, not an improvement upon any scheme of legislation which gave power to fix fees if those fees were made subject to the control of the judges according to their views of what fees were reasonable or unreasonable. The question whether there is power to impose a fee at all is, no doubt, a much more serious question. The contention on the part of the respondent is, that there being no express power given to impose fees,

(1) [1894] A. C. 355.

ASTBURY J. 1928 TATTERSALL v. SLADEN.

it can never be supposed that it was intended to commit to a public body without express sanction and authority the power to impose taxation, which this in effect is. I cannot myself regard this as properly called taxation. The statute of 1883, of which this Act in many particulars is an amendment, creates a register, or, at all events, continues a register, and it provides that the Board of Trade, with the sanction of the Treasury, may regulate the fees to be required for registering and doing other acts in connection therewith; and of course the fixing of fees for a great variety of matters being left to a rule-making body is a description of legislation thoroughly well understood. It is every-day practice for those to whom rule-making is committed to have committed to them also the fixing of the fees which are to be paid in relation to matters to be done under the rules. There is, therefore, nothing novel in legislation of this description. But it is said that no such right is expressly conferred. My Lords, it is impossible to my mind to conceive wider language than that which is used in sub-s. 2 of s. 1 of the Act of 1888. The truth is, the legislation is a skeleton piece of legislation left to be filled up in all its substantial and material particulars by the action of rules to be made by the Board of Trade."

Later on he says (1): "It must be remembered that it is committed to a public department, and a public department largely under the control of Parliament itself."

Then he comes to the conclusion quite irrespective of s. 101, sub-s. 3, of the 1883 Act, that there was ample ground for determining that the Board of Trade rules were valid. Lord Watson (2) agreed with Lord Herschell quite independently of s. 101, sub-s. 3, and Lord Russell of Killowen said (3): "As to the broader questions, I think the rules are intra vires, and are therefore valid and binding even apart from the provisions in s. 101 of the Act of 1883."

In many respects that case goes considerably beyond the issue in the present case, because here the Board may make regulations prescribing the fees to be paid for retention.

(1) [1894] A. C. 357. (2) [1894] A. C. 362.
(3) [1894] A. C. 367.

Retention fees are therefore chargeable; retention is authorized; and it seems to me to follow naturally, that if the retention fee is not paid the retention cannot take place.

Although there is not the same language—namely, that the Board are to make such regulations as in their opinion are necessary to carry the Act into effect—there is something perhaps stronger from some points of view. The Board are the technical body making the regulations; matters on which regulations may be made are expressly referred to. Then the regulations so made have to be approved by the General Medical Council (a body of great importance), they have further to be approved by the Privy Council, and lastly, after all this approval they have to be laid on the table of both Houses of Parliament. It seems to me impossible, having regard to the views expressed in *Lockwood's* case (1), to say that these regulations are other than intra vires. That being so, I do not feel able to hold that these rules are invalid merely because they expressly provide for non-retention of a name on the register if the retention fee is not paid. It seems a necessary sequitur to prescribing the fee for retention.

For these reasons I hold that the defendant has committed a breach of clause 13 of the partnership articles, that the plaintiff was justified in giving his notice of dissolution, and is entitled to a declaration that the partnership was duly dissolved.

There will be a declaration that the defendant, owing to non-payment of his 1927 retention fee, became liable under the dental regulations to have his name removed from the register, and accordingly the plaintiff was entitled to give notice of dissolution under clause 13.

Solicitors: *Waterhouse & Co.; Percy Robinson & Co.*

(1) [1894] A. C. 347.

G. R. A.

ROMER J.

1927

Oct. 14, 17.

In re KING.

PUBLIC TRUSTEE *v.* ALDRIDGE.

[1927. K. 325.]

Infant Member of fluctuating Class—Destination of Accumulations during Minority—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 43, *sub-s.* 2—*Trustee Act*, 1925 (15 *Geo.* 5, *c.* 19), *s.* 31.

Certain property was vested in the Public Trustee under a settlement whereby the settlor directed him after her decease to pay the income to the tenants for life therein mentioned and directed that after the death of any tenant for life the share of that tenant for life should be held in trust for the grandchildren of the settlor in manner therein mentioned. One of the tenants for life died in the lifetime of the settlor. This summons was taken out by the Public Trustee for the direction of the Court as to the application of the accumulations of income of the share of the tenant for life who died in the lifetime of the settlor, having regard to the facts that (*a*) no grandchild of the settlor had attained the age of twenty-one years, or being female had married, at the death of the settlor (*b*); that one of the grandchildren of the settlor was born after the dates, when two of such grandchildren had attained the age of twenty-one years, and (*c*) a grandchild of the settlor who survived the settlor, died under the age of twenty-one years:—

Held, that the property from which the accumulated income arose must be regarded as the share to which the infant would become ultimately entitled, even though that share might be reduced by reason of other members of the class coming into existence.

Held, also, that the share of the grandchild, who had died under the age of twenty-one years, which had been provisionally assigned to that grandchild, ought to be treated as not having been properly assigned and that that portion of the money which had accrued while the infant was a member of the class and which had not been applied in the maintenance and education of the infant, ought to be reassigned amongst the other persons who were at that time members of the class.

Observations on the method of dealing with accumulations of income provisionally assigned to infant members of a class, having regard to s. 43 of the Conveyancing Act, 1881, and s. 31 of the Trustee Act, 1925.

ADJOURNED SUMMONS.

By a voluntary settlement dated September 18, 1916, Sarah King, a widow (the settlor), directed that the Public Trustee should stand possessed of all the real and personal estate mentioned therein upon trust for sale and otherwise as therein mentioned and should hold the net proceeds of such sale, after making the payments therein directed, upon trust for the settlor during her life as therein mentioned.

By clauses 5–11 of the settlement, separate trusts were declared in respect of seven equal shares of the settled fund after the death of the settlor in favour of the four sons and three daughters of the settlor therein named and the husbands of two of the said daughters during their respective lives, and by clause 12 of the settlement it was provided as follows: "After the death of the settlor and subject as to the parts thereof for the time being affected thereby to the aforesaid trusts in favour of the settlor's said four sons and three daughters and the said husbands of two of the said daughters the Public Trustee shall stand possessed of the settled fund and the income thereof in trust for such of the settlor's grandchildren being children of her said four sons and three daughters as are now living or shall be born at any time hereafter during the lifetime or after the death of the longest liver of the settlor's said four sons and three daughters and being male attain the age of 21 years or being female attain that age or marry under that age if more than one equally and as a single class per capita and not per stirpes."

By clause 13 it was provided: "So long as the class of grandchildren of the settlor capable of taking under the aforesaid trust shall be liable to increase by the birth of a grandchild the Public Trustee shall pay the income of the share of the settled fund to which any grandchild, who is for the time being living and has attained a vested interest or to which the personal representatives of any grandchild who is for the time being dead, having attained a vested interest is or are for the time being presumptively entitled in possession having regard to the number of grandchildren for the time being living and for the time being dead having attained vested interests to the grandchild in question or to the representatives of the grandchild in question (as the case may be) and shall pay or apply or deal with the income of the share of the settled fund to which any grandchild who is for the time being living and has not attained a vested interest is for the time being contingently and presumptively entitled as aforesaid in the same manner as it is by section 43 of the Conveyancing Act, 1881, directed that trustees shall

ROMER J. 1927 KING, *In re.* PUBLIC TRUSTEE *v.* ALDRIDGE.

pay or apply or deal with income to which that section relates."

Arthur King, one of the four sons of the settlor, died in the lifetime of the settlor—namely, on April 12, 1919, without ever having had any issue.

The settlor died on May 23, 1923.

Since the death of the settlor the Public Trustee had accumulated the surplus income of the one-seventh share of the settled fund which was directed to be paid to Arthur King during his life.

On April 9, 1927, this summons was taken out by the Public Trustee to obtain the directions of the Court as to the trusts applicable to the said accumulations of income having regard particularly to the facts that: (*a*) no grandchild of the settlor had attained the age of twenty-one years or, being female, had married at the death of the settlor; (*b*) that the defendant, Peggy Audry Lilian King (a grandchild of the settlor), was born after the dates when two of such grandchildren—namely, the defendant, John William Robert Aldridge, and Florrie Isabella King—had attained the age of twenty-one years; and (*c*) a grandchild of the settlor, namely Cyril Albert King, died under the age of twenty-one years on June 15, 1926.

The questions for the determination of the Court were: (1.) whether the accumulations during the minority of the defendant J. W. R. Aldridge of the share of income of the settled fund to which he was then contingently and presumptively entitled, (*a*) became payable to him on his attaining the age of twenty-one years, or (*b*) ought to be retained by the plaintiff, as the sole trustee of the settlement, as capital of the settled fund and held on trust in equal shares per capita for all the grandchildren of the settlor who had attained or should thereafter attain vested interests in the settled fund; (2.) whether the accumulations during the minority of Cyril Albert King, deceased, of income of the share of the settled fund to which he was then contingently and presumptively entitled, on the date of his death, (*a*) became payable, as to an aliquot part thereof, according to the number

of the grandchildren of the settlor living at the date of his death, to each such grandchild who had then already attained a vested interest in the settled fund; or (*b*) became payable, as to an aliquot part thereof, according to the number of the grandchildren of the settlor living at the date when any such grandchild attained a vested interest in the settled fund, to each such grandchild who had then already attained such a vested interest; or (*c*) ought to be retained by the plaintiff as such trustee as aforesaid as capital of the settled fund and held on trust in equal shares per capita for all the grandchildren of the settlor who had attained or should thereafter attain vested interests in the settled fund.

H. H. King for the plaintiff.

C. A. J. Bonner for the defendant J. W. R. Aldridge. This defendant is one of the grandchildren. He attained twenty-one in 1924 and accumulations which up to that time had been made of income were payable, as to a share of them, to him. The case is covered by authority: see *In re Jeffery* (1) and *In re Holford* (2); see also the note after the reference to *In re Jeffery* (1) in Wolstenholme's Conveyancing and Settled Land Acts, 10th ed., p. 114. Sect. 43 of the Conveyancing Act, 1881, applies as regards income, according to the directions in clause 13 of the settlement, but those directions do not extend to the inclusion of the provisions of the section with regard to accumulations. The cases which decide that no member of the class has any interest in the income which accrued before his birth apply in the present case. In order to ascertain the destination of any income at any moment the class must be looked at without reference to any contingency. For instance, if there are two members of a class who have attained twenty-one and eight infants, then ten must be taken as the division and the accumulations must be divided accordingly, and eight shares must be carried contingently to the share of the infants to await the decision whether they attain twenty-one or not; but if at any time the class is increased by the birth of a particular infant, then, as from the period of that birth,

(1) [1895] 2 Ch 577. (2) [1894] 3 Ch. 30.

ROMER J. 1927 — KING, *In re.* PUBLIC TRUSTEE *v.* ALDRIDGE.

the division expressing the number of shares into which the income thereafter accruing is to be divided is increased by one. That point will arise in the circumstances of this case with reference to the defendant Peggy Audry Lilian King.

The income must be dealt with notionally and appropriated according to the actual event; that is to say, although Cyril Albert, who died, must be taken into account, when he falls out of the class, appropriation must be assumed to have been made throughout on the footing that he died, in other words it is necessary to go back and reappropriate and make the necessary apportionments. This method is consistent with principle and authority and is covered by the authority of *In re Jeffery* (1), there being nothing in the present case to displace the application of the result reached in that case.

Robert Peel for the defendant Peggy Audry Lilian King. The first question ought to be answered in accordance with alternative (*b*). The same principle applies to the income which accrued during the life of Cyril Albert King. The people entitled are the whole class of grandchildren referred to in clause 12. Sect. 43, sub-s. 2, of the Act of 1881 treats the accumulations as an accretion to capital. There is nothing in *In re Jeffery* (1) inconsistent with the note in Wolstenholme's Conveyancing and Settled Land Acts. The only question is: "Who are the persons ultimately entitled to the property?" "Property" means "the share to which the infant is contingently entitled," not "the share to which the infant is for the time being entitled without respect to future increase in the class."

This defendant is entitled to participate in the share of a child who died under twenty-one. The trusts are for every member of the class. Each of the adult grandchildren was entitled to take his aliquot share and an infant was entitled to maintenance out of his aliquot share.

ROMER J. This is a somewhat curious question which has arisen under a voluntary settlement made by Mrs. Sarah King

(1) [1895] 2 Ch. 577.

on September 18, 1916. By that settlement she vested certain property in the Public Trustee upon trust for sale and investment of proceeds and directed the Public Trustee to pay the income to the settlor (who is now dead) during her life and after her death to pay the income of an equal seventh share to each of her seven children therein mentioned for life, and in the case of two of her daughters to pay part of the income after the death of such daughter to that daughter's husband during his life. Subject to these trusts the Public Trustee was to stand possessed of the settled fund and the income thereof in trust for such of the settlor's grandchildren, being children of her said seven children as were then living or should be born at any time thereafter during the lifetime or after the death of the longest liver of the seven children and being male should attain the age of twenty-one years or being female should attain that age or marry in equal shares per capita and not per stirpes.

One of the life tenants has died in the settlor's lifetime, the other six are still living, and the trustee wishes to know how he is to deal with the income arising from the one-seventh share of the child who is dead. It would follow from what I have said that we have an ordinary case of a gift to a class capable of increase or, rather, to such members of a class which is capable of increase as shall attain the age of twenty-one years, the gift being one that carries the intermediate income.

Now it has long since been laid down by the Court of Appeal, differing from a view which North J. had expressed in the case of *In re Jeffery* (1) that, in a case of that sort, each member of the class as he attains twenty-one is entitled to receive such part of the income as he would be entitled to receive if the class were then closed, that is to say, supposing at the time the eldest of the class attains the age of twenty-one there are only six members of that class in existence, as from the time he attains twenty-one he is entitled to receive one-sixth of the income notwithstanding that the class is capable of increase. Should the class increase later

(1) [1891] 1 Ch. 671.

ROMER J. 1927 KING, *In re.* PUBLIC TRUSTEE *v.* ALDRIDGE.

by the birth of a seventh member, as from that time the member of the class who has attained twenty-one would only receive one-seventh of the income assuming that the other members of the class are still in existence. That is very well settled as regards the income of members of the class who have attained the age of twenty-one years. Now what about the members of the class who have not attained, for the time being, the age of twenty-one years ? I think it is equally well settled that the same thing is done provisionally, that is to say, if there are six members of the class, of whom one only has attained twenty-one, one-sixth of the income ought to be provisionally allocated to each of the other five members. If and when another member comes into existence so that there are seven members of the class there will thenceforth be allocated to each of the six minors a seventh share of the income.

Now what is to happen to the income so provisionally assigned to an infant member of a class ? In general that I think would be governed by s. 31 of the Trustee Act, 1925, replacing s. 43 of the Conveyancing Act, and under that section the trustees would, in my opinion, be justified in treating the income so provisionally assigned to the infant member of the class as the income produced by property to which that infant was contingently entitled and would be justified in applying that income for the maintenance, education and benefit of the infant. So far as not so applied the balance of the income would have to be accumulated under sub-s. 2 of the section. Now as a matter of fact this is exactly what is expressly provided for by clause 13 of the settlement. That clause is as follows : " So long as the class of grandchildren of the settlor capable of taking under the aforesaid trust shall be liable to increase by the birth of a grandchild the Public Trustee shall pay the income of the share of the settled fund to which any grandchild who is for the time being living and has attained a vested interest or to which the personal representatives of any grandchild who is for the time being dead having attained a vested interest is or are for the time being presumptively entitled

in possession having regard to the number of grandchildren for the time being living and for the time being dead having attained vested interests to the grandchild in question or to the representatives of the grandchild in question (as the case may be)"—that is dealing with the members of the class who attain twenty-one years. Then the settlor goes on to say: "and shall pay or apply or deal with the income of the share of the settled fund to which any grandchild who is for the time being living and has not attained a vested interest is for the time being contingently and presumptively entitled as aforesaid in the same manner as it is by section 43 of the Conveyancing Act, 1881, directed that the trustees shall pay or apply or deal with income to which that section relates." So far there does not seem much difficulty about the matter. But what are the trustees to do with the accumulations of the income provisionally allotted to the members of the class who have not attained twenty-one, i.e., that part of the income which has not been applied in maintenance and education of the infant? Let me again take the case of there being six members of the class in existence, five of whom are infants. The trustees provisionally allocate to each of the five infants a sixth part of the income. So far as that sixth part of the income is not applied in maintaining the particular infant for whose benefit it has been provisionally apportioned it will have to be accumulated. But supposing by the time the infant attains the age of twenty-one years the class has increased to seven, what is to be done with the accumulations made at a time when the class only consisted of six members? In other words, what is the property from which those accumulations arose, for according to the Act the accumulations only go to the infant on attaining twenty-one if he becomes entitled to that property. In my opinion the property from which the accumulated income arose is the share to which the infant becomes ultimately entitled, even though that share may be considerably smaller than a sixth by reason of other members of the class coming into existence. For it appears to me that in each year in which there are only six members of the

ROMER J. 1927 KING, *In re.* PUBLIC TRUSTEE *v.* ALDRIDGE.

class the income of the ultimate share of each member of that class, whatever it may be, is one-sixth of the income of the trust fund, in other words that, during the time that there are only six members of the class, the ultimate share of each member is earning income and the ultimate shares of persons who are not at that time members of the class are not earning income. The result of that will be that, as each member of the class attains twenty-one he will be entitled to be paid all accumulations of income provisionally assigned to him in the way that I have mentioned before, because that income so provisionally assigned to him is to be regarded as the income of the property to which he ultimately becomes entitled.

Now what is to be done supposing, as has happened in this case, one of the members of the class to whom a share has been provisionally assigned dies under the age of twenty-one years? It seems to me that logically the trustee ought to treat the share so provisionally assigned, so far as, of course, it is not applied in maintenance of the child, as not having been properly assigned, and then to reassign the income accruing while that infant was a member of the class amongst the others who were at that time members of the class. While there are six members, for instance, the income will be divided into six parts: those who are adults will receive their sixth; for those who are minors there will be provisionally allotted a sixth. When another member of the class comes into existence the income will be divided and provisionally allotted into sevenths. Supposing before another member of the class comes into existence one of the seven dies an infant, then it appears to me that the trustee must go back and if that infant was one of those originally entitled to one-sixth he must, during the period that he was dividing and provisionally assigning the income in sixths, divide and provisionally assign it in fifths and as from the time that the seventh grandchild was born, instead of dividing and provisionally assigning it in sevenths he must divide and provisionally assign it into sixths. This is a mere matter of book-keeping and should not be difficult to apply in practice.

The order as drawn up was as follows :—

This Court doth appoint the defendant John William Robert Aldridge to represent for the purposes of this application the class of grandchildren of the above named Sarah King who have attained a vested interest in the fund subject to the trusts of the said settlement and the defendant Peggy Audry Lilian King to represent for the purposes of this application the class of grandchildren of the said Sarah King who are now living and have not attained a vested interest in the said settled fund. And this Court doth declare that the accumulations during the minority of any male and the minority and spinsterhood of any female grandchild of the said Sarah King who has attained or shall hereafter attain a vested interest in the said fund of the income of the share of the said settled fund in which such grandchild has attained or shall attain a vested interest are or as the case may be will become payable as to aliquot parts thereof according to the number of grandchildren of the said Sarah King for the time being living at the respective dates when the several sums of income from which such accumulations have been derived accrued to such grandchild on attaining the age of twenty-one years or being female marrying under that age. And this Court doth declare that the accumulations during the minority of Cyril Albert King deceased of the share of income of the said settled fund to which the said Cyril Albert King was contingently entitled became on the death of the said Cyril Albert King as to aliquot parts thereof according to the number of grandchildren of the said Sarah King other than the said Cyril Albert King for the time being living at the respective dates when the several sums of income from which such accumulations have been derived accrued payable to each such grandchild who had at the date of the death of the said Cyril Albert King attained a vested interest in the said settled fund. And this Court doth declare that as regards any such accumulations not yet payable to grandchildren who have attained a vested interest the same ought to be provisionally appropriated to the shares of the grandchildren of the said Sarah King in the proportions in which they were presumptively and contingently entitled to share in the said income at the respective dates when the several sums of income from which such accumulations have been derived accrued subject nevertheless in the event of the death of any grandchild before attaining a vested interest to reappropriation and adjustment on the footing that the grandchild so dying had never been contingently entitled but without prejudice to any exercise of the plaintiff's power to apply such accumulations for maintenance. And this Court doth order that the costs of the plaintiff and the defendants of and preliminary to and consequent upon this application be taxed by the taxing Master as between solicitor and client and be raised and paid by the plaintiff out of the capital of the said settled fund.

Solicitors : *Wilkinson, Bowen & Co.*

J. L. D.

C. A.
1926
LAWRENCE J.
July 13.
C. A.
Nov. 15.

CALDER'S YEAST COMPANY, LIMITED *v.* STOCKDALE.

[1925. C. 1448.]

Vendor and Purchaser—Rates—Special Expenses—Sewerage Works—Charge on Land—Outgoings—Specific Performance—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 229, 230, 233, 257.

A rate levied by the overseers on a contributory place for the purpose of meeting "special expenses" incurred by a rural authority under ss. 229 and 230 of the Public Health Act, 1875, in respect of sewerage and sewage disposal, is not a charge upon the land in the contributory place, but is a mere outgoing in respect of which the occupier and not the land is liable.

When therefore land is sold subject to all outgoings, the vendor is not liable to discharge a special expenses rate, and his refusal to do so is no defence by a purchaser to an action by the vendor for specific performance.

So *held* by Lawrence J. and the Court of Appeal.

ACTION.

By an agreement dated May 17, 1923, the plaintiffs agreed to sell to the defendants (Charles T. Stockdale and his wife), for the price of 3250*l.*, certain freehold land at Thornton-le-Moor, in the county of York, with the brewery thereon and certain adjoining messuages, and it was thereby provided that the purchase money should be paid by certain instalments, and that on November 17, 1923, the purchase should be completed and the balance of the purchase money secured to the vendors by the defendants executing a mortgage of the premises in favour of the vendors.

It was made a condition of the agreement that the property should be subject to all incidents of tenure, easements and other outgoings; and further that any misstatement or omissions in the particulars should not annul the sale or be a ground for any abatement or compensation on either side.

The sum of 350*l.* having been paid by way of deposit, the defendants on May 17, 1923, entered into possession of the premises, but since the date of the agreement the defendants paid to the plaintiffs no further part of the purchase moneys.

An abstract of title and requisitions and replies thereto were delivered, and after a long interval, on February 18, 1925, the plaintiffs gave the defendants notice requiring them to complete the purchase, and as a result of the defendants failing to comply with that notice the plaintiffs brought this action, claiming that the defendants were bound to accept the plaintiffs' title and specific performance of the agreement.

The defence was that the delay in completion was due to the refusal of the plaintiffs to release the property from a certain charge thereon under the Public Health Act, 1875, which was not disclosed to the defendants, or in the alternative to pay them compensation in respect of such liability.

It was pleaded by the defendants that in 1901 and in 1909 loans of 900*l.* and 282*l.* were respectively raised by the Thirsk Rural District Council under the powers conferred upon them by the Public Health Act, 1875, for the purpose of carrying out some sewerage works in the parish of Thornton-le-Moor, which loans were repayable by instalments of principal and interest over periods of thirty and twenty-two years, and became chargeable on that parish and raisable by a special rate, as provided by ss. 229 and 230 of the Act of 1875, upon the lands situate in the same parish. It was alleged that that special rate would continue to be payable during the residue of those periods and be a charge on the property agreed to be sold.

It appeared that demand notes had been received by the defendants from the overseers of the Thirsk Rural District Council demanding poor rate for expenses to be incurred before September 30, 1923, 1924 and 1925 respectively, and the notes contained demands for payment of the special expenses rate made on the same days as the poor rate, and of arrears as therein stated—namely, special rate at 2*s.* in the pound on full rateable value on one-fourth of the rateable value of land, 3*l.* 12*s.*, and arrears and the poor rate and general expenses rate were added together and the total amount stated.

C. A. 1926 — CALDER'S YEAST CO. v. STOCKDALE.

Under s. 229 of the Public Health Act, 1875, the expenses incurred by a rural authority in the execution of the Act are divided under the headings of "general expenses" and "special expenses," the latter being expenses of (inter alia) the construction, maintenance and cleansing of sewers in any contributory place within the district. Every parish (with certain exceptions) was made a "contributory place" for the purposes of the Act. Under s. 230 the rural authority were, for the purpose of obtaining payment of the sums to be contributed, to issue to the overseers of each contributory place their precept requiring contribution for "general expenses" and for "special expenses," and they were to issue separate precepts for general and special expenses, or they might make those expenses separate items in their precept, including both classes of expenses. Then the overseers were to pay the contribution required for general expenses out of the poor rate of their respective parishes and with respect to special expenses by raising the contribution by the levy (on the whole parish or on the contributory place forming part of a parish, as the case might be) of a separate rate in the same manner as if it were a rate for the relief of the poor. And such separate rate was, as respects the powers of the overseers in relation to making, assessing and levying such rate and all other incidents thereof, to be subject to the same provisions as applied in law to a rate levied for the relief of the poor.

By s. 257 expenses incurred by the local authority until payment of them had been recovered from the owner of the premises in respect of which the expenses had been incurred were made "a charge on the premises."

The action was heard before Lawrence J. on July 13, 1926.

Jenkins K.C. and *Hugh Gamon* for the plaintiffs. The special expenses rate is not a charge upon the land. It is no more a charge than is the general expenses rate. Sect. 229 of the Act of 1875 provides for the division of the expenses incurred by a rural authority into "general expenses" and "special expenses"; the former are to be paid out of the

poor rate of the parishes in the district according to the rateable value of each contributory place, while the latter is to be a separate charge on each contributory place. But it is not a charge in the sense of being a charge on the land in the contributory place: nor is that rate a charge within the ambit of s. 257. By s. 230 provision is made for raising the amount of money required for the expenses, both general and special: see Lumley's Public Health, 9th ed., vol. i., p. 510. The separate rate to be levied under s. 230 is, as regards the powers of the overseers in relation to making, assessing and levying such rate and all incidents thereof, to be subject to the same provisions as apply in law to a rate levied for the relief of the poor. As to the incidents of a poor rate see Ryde on Rating, 5th ed., p. 7. A poor rate is an outgoing and not a charge on the land; it is a charge on occupation and not ownership of land. Therefore, the plaintiffs are under no obligation to discharge any part of this rate accruing after the time fixed for completion of the contract. The title having been accepted the plaintiffs are entitled to judgment for specific performance.

Owen Thompson K.C. and *Joseph Tanner* for the defendants. The rate for special expenses is a charge on the property contracted to be sold and is not a mere outgoing, and the defendants are entitled to be indemnified by the plaintiffs against it. Sect. 230 of the Public Health Act, 1875, is only concerned with the method of collecting the contributions. Both rates are to be levied on the footing of a poor rate, but the general expenses rate is to be raised out of the poor rate, while the special expenses rate is not so raisable, but is to be levied on each contributory place which makes it a charge on the lands of that place. There was an inchoate liability created in 1901 and 1909, when the moneys were borrowed on mortgage, the repayment of which was spread over thirty and twenty-two years. The rate was a charge on the land within the terms of s. 257 of the Act. The liability became, upon the completion of the works, a charge which was in existence when the agreement for sale was entered into, and the defendants must be indemnified against such

C. A. 1926

CALDER'S YEAST CO. v. STOCKDALE.

liability: Williams on Vendor and Purchaser, 3rd ed., p. 497; *Stock* v. *Meakin*. (1)

LAWRENCE J. This case raises the short point whether, under this contract, the vendors or the purchasers ought to pay a rate which had been made for special expenses payable by instalments extending over a period of years. [His Lordship then stated the facts and proceeded as follows:] The defendants contended that this special expenses rate is a charge on the land comprised in the contract and is not a mere outgoing. In my judgment that contention is not well founded. Sect. 230 of the Public Health Act, 1875, provides not only that the special expenses rate is to be levied by the overseers in the same manner as if it were a rate for the relief of the poor, but also that such rate, both as regards the powers of the overseers in relation to making, assessing and levying and as respects appeal and as to all other incidents (with certain immaterial exceptions), is to be subject to the same provisions as apply in law to a rate levied for the relief of the poor. Counsel for the defendants argued that the provisions to which I have just referred deal only with the mode in which the rate is to be collected and the liability of the ratepayers is to be enforced. In my opinion these provisions have a wider operation—namely, to place the special expenses rate for all practical purposes on the same footing as a poor rate.

Now the position and incidents of a poor rate are clearly and accurately set out in the following passages of Mr. Ryde's valuable work on rating (5th ed., p. 7)—namely, "The poor rate is not a tax on the land, but a personal charge in respect of the land. So that to the validity of the rate it is essential, not only that the land should be within the parish for which the rate is made, but that there should be an occupier of that land who can be made liable. Consequently, if the owner is entitled to exemption, but the occupier is not, the liability attaches; on the other hand, if the owner is not, but the occupier is exempt, then no liability attaches. Again,

(1) [1900] 1 Ch. 683.

if the rate is not paid, it is recoverable by distress and sale of the goods of the offender, and of no other person, and is not charged on the land. The overseers' power of distraining is not like that of a landlord, so that they cannot distrain on the goods of a lodger, or a stranger, though found on the premises. On the other hand, the overseers can distrain on the offender's goods wherever found, even though in another county; and may seize plough-horses or other animals used for working the land. . . . . But unpaid arrears cannot be recovered from a succeeding occupier, and an occupier going out, or coming in, during the period for which a rate is made, is liable only for so much of the rate as is proportionate to the length of his occupation." If, as I think, this passage applies to the special expenses rate in question here, it follows that such rate is an outgoing within the meaning of the contract and that the vendors are not liable to discharge any part of it accruing after the date fixed for completion.

There remains to be dealt with the contention of the defendants based upon the following words contained in s. 229: "Special expenses shall be a separate charge on each contributory place." It is argued that these words have the effect of making the special expenses rate in question here a charge on the land comprised in the contract as being a rate in respect of special expenses originally incurred in respect of the land within the meaning of s. 257. In my view this argument is wholly unfounded. The expenses referred to in s. 257 are expenses incurred for the benefit of particular premises within the district of the Rural or Urban Council having the incidents described in s. 257, which are wholly distinct from any incidents which apply to the poor rate or to the special expenses rate in question here. The explanation of the words used in s. 229 is, to my mind, perfectly plain when the section is read as a whole. The section deals with two sets of expenses—namely, the general expenses incurred by the local authority on the one hand and the special expenses incurred by the local authority on the other hand. The general expenses are payable out of a common fund which has to be raised out of the poor rate of the parishes

C. A. 1926 — CALDER'S YEAST CO. v STOCKDALE. — Lawrence J.

in the district. The special expenses are to be a separate charge on the contributory place in respect of which they are incurred. The emphasis in that sentence is on the word "separate," that is to say, the special expenses are to be payable out of a rate levied on the contributory place and not out of the common fund raised out of the poor rate, unless the rate for the special expenses is less than 10*l*., in which case it is to be paid out of the common fund. In my judgment there is nothing whatever which operates to make a rate for special expenses a charge upon the premises in respect of which the original expenses were incurred within the meaning of s. 257.

To sum up, I am clearly of opinion that on the scheme of the Act the rate for special expenses is not a charge on the land in the contributory place, but stands on the same footing as the poor rate and is an outgoing within the ordinary acceptation of that term which falls to be paid by the vendors up to the time fixed for completion and after that date must be paid by the purchasers. Upon the footing that the title is accepted, I will make a declaration that the contract ought to be specifically performed.

H. C. H.

C. A.

The defendants appealed. The appeal was heard on November 15, 1926.

Owen Thompson K.C. and *Joseph Tanner* for the appellants, repeated in substance the arguments used by them in the Court below.

Jenkins K.C. and *Hugh Gamon* for the respondents were not called upon to argue.

LORD HANWORTH M.R. This is an appeal from a decision of Lawrence J. (as he then was). It is unnecessary for me to restate the facts which are set out in his judgment. The question is whether the appellants are entitled to any relief under a contract made between them and the respondent company for the sale to them of property at Thornton-le-Moor in Yorkshire. It is said that the appellants have suffered by the non-disclosure by the vendors of a liability

which attached to the owners of this property which the appellants were to acquire under the contract. In December, 1900, sanction was given by the Local Government Board for the Thirsk Rural Council raising a loan for the expenses to be incurred by them for the purposes of sewerage and sewage disposal for the township of Thornton-le-Moor, and on December 14, 1900, the Board sanctioned the borrowing of 900*l.* on credit of the rates, which the council were authorized to mortgage, that loan to be repayable with interest within a period of thirty years from the date of the borrowing, and on July 20, 1901, the council thereupon mortgaged their rates, to secure 900*l.*, to be repaid by thirty annual instalments with interest. On April 15, 1909, the council further mortgaged their rates for a sum of 282*l.*, also required for sewerage works, and both these mortgages had to be paid off by July, 1931. It is said that the rates to be paid by the appellants are thus increased. The Local Government Board, when they gave their sanction, stated that these expenses of the sewerage works should be special expenses under the Public Health Act, 1875, and the appellants say that at the time of the contract the vendors did not disclose these special expenses, and they therefore claim that on the requisition which they made compensation ought to be paid to them in respect of this undisclosed liability, as they say, on the property. The contract by clause 7 provided that the sale should be subject to certain conditions, one of which was that the property should be taken to be sold subject to all outgoings. That word "outgoings" has been construed in a number of cases, but I need only refer to *Smith* v. *Robinson* (1), in which Wright J., who delivered the judgment of the Divisional Court, said: "Tenants have got off in cases where no such word has occurred as 'charge,' 'duty,' or 'outgoings,' or where there have been no words extending to charges upon the owner, or where there are words indicating an intention that the landlord is to pay; but where the words are sufficient we must hold the governing intention to be that the owner shall get his rent clear of all deductions." The

(1) [1893] 2 Q. B. 53, 56.

C. A. 1926

CALDER'S YEAST CO. v. STOCKDALE.

Lord Hanworth M.R.

word "outgoings" therefore is a word of large signification. It is said that notwithstanding that wide interpretation of the word, the vendors ought to have disclosed the liability to this special expenses rate and should be made liable in respect of the non-disclosure of that liability. Sect. 229 of the Public Health Act, 1875, deals with the expenses of rural authorities, both general expenses and special expenses, which are there stated to be the expenses incurred in sewerage works generally and the providing a supply of water and all other expenses incurred by the local authority determined by order of the Local Government Board to be special expenses and provided that special expenses should be a separate charge on each contributory place. Sect. 230, which provides for levying the rate, is in these terms: "The overseers shall comply with the requisitions of such precept by paying the contribution required in respect of general expenses out of the poor rate of their respective parishes, and with respect to special expenses by raising the contribution required by the levy (in the case of an entire parish on the whole of such parish, and in the case of a contributory place or part of a contributory place forming part of a parish, by the levy on such place, or such part thereof, exclusive of the rest of the parish) of a separate rate in the same manner as if it were a rate for the relief of the poor." Then, after providing for a certain exception, the section continues: "A separate rate under this section shall, as respects the powers of the overseers in relation to making assessing and levying such rate, and as respects the appeal against such rate, and all other incidents thereof except the purposes to which it is applicable, and such exemption as aforesaid, and except the allowance of justices, which shall not be required, be subject to the same provisions as apply in law to a rate levied for the relief of the poor."

It is to be observed, therefore, that there is no special provision as in s. 257, that there shall be a charge on the premises. The rate for special expenses in specific terms is not charged on any land, but it is to be levied in the same manner as if it were a rate for the relief of the poor by a separate rate. Therefore these special expenses are different

from general expenses, which are payable out of a common fund to be raised out of the poor rate of the parishes in the district. But the fact that the rate for special expenses is leviable on a particular portion of an area does not make it different from the poor rate. There have been decided a number of cases showing that the poor rate is an outgoing, and here we have the word "outgoings," without any limitations. Therefore in my judgment the decision of Lawrence J. was right, and for the reasons he gave and those which I have added, the contentions of the appellants cannot be maintained, and the property is subject to all outgoings, including this special expenses rate, which is payable by the occupiers, the purchasers.

ATKIN L.J. I agree. [His Lordship stated the facts and continued:] It is contended by the appellants who contracted to purchase the property in question that the liability in respect of that rate for special expenses, which will continue payable yearly up till 1931, is one which has to be discharged by the vendors, or is a matter for payment to them of compensation as being a matter affecting the value of the land and in the nature of a secret incumbrance on the property. Those arguments are based on a misapprehension. This is a question which is capable of being determined solely on the contract made between the parties which was dated May 17, 1923, and that was made subject to the general conditions of the Yorkshire Union of Law Societies, of which condition 7 provided that the property should be subject to all incidents of tenure, easements, or other outgoings, and clause 9 that any misstatement or omissions in the particulars shall not annul the sale or be a ground for any abatement or compensation on either side. This rate for special expenses arises under the Public Health Act, 1875, ss. 229 and 230, and the rural district council got power from the Local Government Board to borrow money on the rates. Under s. 49 of the Public Health Acts Amendment Act, 1907, the local authority were given power to give notice to the owner or occupier of a building requiring him to provide a sink or drain to the house, and in

C. A. 1926 — CALDER'S YEAST CO. v. STOCKDALE. — Atkin L.J.

case of his default in so doing might themselves provide the same, and the expenses incurred by them in so doing were made repayable to them by the owner or occupier and be recoverable as a civil debt. The result of that was that under the Public Health Acts the rural district council were able to levy a rate in addition to the poor rate, but in every respect the rate so levied was to have the same operation as the poor rate, and, therefore, it differs in no way from any other rate levied upon the occupier. It is clear, therefore, that there is no foundation for the contention that there is something different from an ordinary rate in this special expenses rate. This rate is not a charge on the property, and is quite different from a charge for paving expenses. For these reasons in my judgment this is an ordinary outgoing in the nature of an incumbrance which has to be discharged, and nothing was concealed therefore from the purchasers, and they have no ground for claiming compensation. The appeal must, therefore, be dismissed.

SARGANT L.J. I agree. It is clear that, whether under the general law or the particular statute applicable, this special expenses rate is a rate which has to be discharged by the purchaser. It would be very inconvenient if on a purchase it had to be discovered whether or not any particular rate could be treated by the purchaser as still payable after he had purchased the property by his vendor, who might leave the neighbourhood or cease to reside in this country and the local authority would have difficulty in keeping in touch with him. The appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Ward, Bowie & Co., for Charles Thomas Stockdale, Sunderland.*

Solicitors for respondents: *Bell, Brodrick & Gray, for Fowle & Hunt, Northallerton.*

W. I. C.

In re REEVES.

REEVES *v.* PAWSON.

[1927. R. 1643.]

RUSSELL J.

1928

Jan. 26.

Will—Construction—Bequest of "my present lease"—Expiration of Lease—New Lease taken after Execution of the Will—Subsequent Codicil confirming the Will—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 24.

By his will a testator bequeathed to his daughter "all my interest in my present lease of No. 1 Chesterfield Street," which at that time had nearly three and one-half years to run. The testator afterwards acquired a renewal of the lease and, at a later date, having added a codicil to his will, confirmed his will in all other respects. This summons was taken out by the trustees to determine whether the bequest in the will to the daughter "of all my interest in my present lease of No. 1 Chesterfield Street" was a bequest of the renewed lease:—

Held, that by the use of the words "in all other respects I confirm my said will" the testator had brought down the date of the will to the date of the codicil, and so made the bequest in the will operate in the same way as it would have done if the words in the will had been contained in the codicil of later date. The benefit of the renewed lease therefore passed to the testator's daughter under the provisions of his will.

ADJOURNED SUMMONS.

At the date of his will the testator was the lessee of No. 1 Chesterfield Street, Mayfair, under a deed dated September 25, 1917. The term was for seven years from September 29, 1917. The house was taken by the testator as a residence for his daughter, Mrs. Pawson, who had resided there up to the present time, During his lifetime the testator was rated as the occupier and paid the rent, rates and taxes. During the currency of the lease—namely, on May 3, 1921—the testator made his will. Clause 4 thereof was as follows: "I bequeath to my said daughter all my interest in my present lease of No. 1 Chesterfield Street Mayfair and I further direct that all obligations arising under such lease shall be discharged out of monies arising out of my residuary estate." The testator then disposed of his residuary estate in favour of his three children—namely, his two sons, the plaintiffs, and his daughter. The daughter's share was settled. By an indenture

RUSSELL J.
1928
REEVES, *In re.* REEVES *v.* PAWSON.

of lease dated December 31, 1923, No. 1 Chesterfield Street, was demised to the testator as from September 29, 1924, for a term of twelve years less three days. On February 10, 1926, the testator made a codicil to his will and, after making a bequest to his grandson, continued: "And in all other respects I confirm my said will."

This summons was taken out by the plaintiffs, who were the trustees of the will and also beneficiaries, to determine whether the gift in the will to Mrs. Pawson of "all my interest in my present lease of No. 1 Chesterfield Street Mayfair" carried the lease dated December 31, 1923.

Jenkins K.C. and *Wright Taylor* for the plaintiffs. By s. 24 of the Wills Act, 1837, a will is to be construed to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears in the will. Thus where there is a gift of a definite specific thing the testator must be speaking of something he has at the date of the will, and that may be sufficient evidence of a contrary intention. The word "now" used in the description of property refers to the date of the will, and limits the gift to property then belonging to the testator: see Theobald on Wills, 8th ed., pp. 156, 157. Here "my present lease" is equivalent to "the lease which I now possess," and "present" is an essential part of the description of the bequest. "Although it is true that a codicil confirming a will makes the will for many purposes to bear the date of the codicil, yet this rule is subject to the limitation that the intention of the testator be not defeated thereby. If, therefore, the testator, in making his will, obviously means its provisions to apply to a state of circumstances existing at its date, republication will not make its provisions apply to the state of circumstances existing at the date of the codicil": Jarman on Wills, 6th ed., pp. 203, 204. Here the testator in making his will obviously meant the bequest to apply to the remainder of the lease existing at that date, and republication will not make the provisions of the will apply to the lease for twelve years less

three days existing at the date of the codicil. A specific thing that has ceased to exist cannot be recreated by a codicil confirming the will: *Macdonald* v. *Irvine.* (1)

Here the essential words of description are "my present lease," that is, the first lease, and if those words are repeated in the codicil the daughter takes nothing, because the lease had then expired.

Stafford Crossman for the daughter's infant children. I adopt my friend's argument and say the lease falls into residue.

It is true that for many purposes the republication of a will may affect the property to which a devise or bequest in the will applies; but the authorities do not go to the length of saying that for all purposes in construing it the will must be treated as having been made at the date of the codicil. A doctrine of that sort would lead to extraordinary results. For example, taking the instance put in *Stilwell* v. *Mellersh* (2), there might be a legacy to the person who now holds the position of Treasurer of Lincoln's Inn. If you read the will at a subsequent date the description of the legatee might have been entirely altered: per Parker J. in *In re Park.* (3) If the gift in *In re Hardyman* (4) had been to "his present wife" the decision would have been the other way.

Farwell K.C. and *D. D. Robertson* for testator's daughter. When a codicil expressly confirms a will the effect is to bring down the date of the will to the date of the codicil, and to make the bequest in the will operate as it would have done if the words in the will had been contained in the codicil of later date: *In re Champion* (5); *In re Fraser.* (6) This will is brought down to date by the confirming codicil and forms with it one complete disposition: *In re Smith.* (7) The principle laid down in these cases was applied by Romer J. in *In re Hardyman.* (8) Applying that principle here "my present lease" means the lease existing at the date of the codicil—namely, the lease dated December 31, 1923—and it

(1) (1878) 8 Ch. D. 101.
(2) (1851) 20 L. J. (Ch.) 356.
(3) [1910] 2 Ch. 322, 328.
(4) [1925] Ch. 287.
(5) [1893] 1 Ch. 101, 109.
(6) [1904] 1 Ch. 726, 734.
(7) [1916] 1 Ch. 523, 530.
(8) [1925] Ch. 287, 292.

RUSSELL J. 1928 REEVES, *In re.* REEVES v. PAWSON.

passes to his daughter under the testamentary disposition in the testator's will. In *Macdonald* v. *Irvine* (1) it is submitted that the decision would have been the other way if the testator had bought bonds of the same denomination as those he sold. In that case there was an attempt to make the will pass bonds with which the will never dealt at all—namely, Khedive bonds.

RUSSELL J. But for the fact that the testator executed a codicil to his will there is no doubt that the bequest to his daughter of "my present lease" would have only been a bequest of the lease that expired on September 29, 1924, but it is contended that by confirming his will by codicil on February 10, 1926, during the currency of the new lease, the testator has bequeathed that new lease to his daughter. Reliance is placed on two decisions in the Court of Appeal: *In re Champion* (2) and *In re Fraser.* (3) In the case of *In re Champion* (2) the testator by his will devised a freehold cottage and the land and appurtenances thereto belonging, which he described as "now in my own occupation," to trustees upon certain trusts. After the date of his will he bought two other fields adjoining the cottage, and later made a codicil, by which he substituted other trustees for those named in his will, and confirmed his will in other respects. North J. after holding that on the true construction of the will and codicil the two fields passed to the trustees with the cottage considered the effect of the words of confirmation. He said: "It is settled by authority that the effect of such a phrase as 'I confirm my will in other respects' is a republication of the will, and when, under the old law, a testator had made a will which would merely pass the property he had at the date of it, and then by a codicil he confirmed and republished his will, the effect was to bring down the date of the will to the date of the codicil, and to make the devise in the will operate in the same way in which it would have operated if the words of the will had been

(1) 8 Ch. D. 101. (2) [1893] 1 Ch. 101, 109, 111.
(3) [1904] 1 Ch. 726.

contained in the codicil of later date. There is ample authority on this point." After referring to a number of cases the learned judge continued: "By these cases it seems to me perfectly well settled that, if there were nothing else in favour of the plaintiffs, the codicil makes the will take effect as if it had been executed at the date of the codicil." In the Court of Appeal Lindley L.J., who delivered the judgment of the Court, said (1): "This codicil having been made after the purchase of the two fields, what is its effect upon the devise contained in the will? In my opinion, it is quite clear that the two fields, which as well as the cottage were in his own occupation when he made the codicil, passed to the trustees together with the cottage and its appurtenances." The other decision in the Court of Appeal is that of *In re Fraser* (2), where Stirling L.J., after stating that the testamentary dispositions of the testator included several codicils, and in particular one of July 21, 1898, which contained a confirmation of the will as altered by prior codicils, said: "The effect of this is to bring the will down to the date of the codicil, and effect the same disposition of the testator's estate as if the testator had at that date made a new will, containing the same dispositions as the original will, but with the alterations introduced by the various codicils." Put in another way the will and the codicil are treated as one document bearing the date of the codicil. Thus in *In re Smith* (3) the testatrix directed that: "No legacy given by this my will shall lapse by reason of the death of the legatee before me, but that the same shall take effect as if the death of such legatee had happened immediately after my death, and such legacy shall accordingly pass to the legal personal representative of such legatee." In one of the codicils to her will the testatrix made a bequest to a person who predeceased her. All the codicils contained an express formal clause confirming in all other respects the testatrix's will. Sargant J. held that the clause applied to and saved the bequest in the codicil. He said: "It is well settled law that when a codicil

(1) [1893] 1 Ch. 101, 115. (2) [1904] 1 Ch. 726, 734.
(3) [1916] 1 Ch. 523, 530.

RUSSELL J. 1928 REEVES, *In re.* REEVES *v.* PAWSON.

expressly confirms a will the effect is, in the words of North J. in *In re Champion* (1), 'to bring down the date of the will to the date of the codicil, and to make the devise in the will operate in the same way in which it would have operated if the words of the will had been contained in the codicil of later date.' This decision was affirmed in the Court of Appeal, and the principle has been given full effect to in such cases as *In re Rayer* (2) and *In re Fraser.* (3) It is indeed urged here that the words 'by this my will' point to a particular instrument or writing, namely, the will itself, and that therefore the saving clause is limited by its very terms to the legacies given by the will itself. But I think that this is too narrow a construction. In my view the will itself is alone named in the clause merely because at the time that was the only instrument containing the testatrix's testamentary dispositions. I cannot find in the phrase any intention to denote the particular instrument alone or to exclude from the application of the clause any legacies which should under codicils confirming the will form part of the testatrix's ultimate testamentary dispositions. The will being brought down to date by the confirming codicils and forming together with them one complete disposition, the legacies given by the codicils come, in my judgment, within the description legacies 'given by this my will.'" This is another instance where a judge after citing *In re Champion* (4) and *In re Fraser* (3) held that the will and the codicil were to be treated as one document bearing the date of the codicil and using the language used in the will. The last case is *In re Hardyman.* (5) There the testatrix, by her will made in 1898, gave a legacy of 5000*l.* "in trust for my cousin his children and his wife." The cousin's wife died in January, 1901. In November, 1901, with knowledge of the wife's death, the testatrix added a codicil to her will. She died in December, 1901. In 1903 the cousin remarried. He died in 1924. The question for decision was whether the second wife was entitled to benefit under the bequest of the 5000*l.*

(1) [1893] 1 Ch. 101, 109.
(2) [1903] 1 Ch. 685.
(3) [1904] 1 Ch. 726.
(4) [1893] 1 Ch. 101.
(5) [1925] Ch. 287, 292.

Romer J. said: "It appears to me, in the circumstances, and having regard to the authorities, that I must construe the present will in the light of the fact that by republication the testatrix has said to me: 'This will expresses my intentions at this date' (i.e., the date at which this codicil was made), and that I must not disregard that fact. But Mr. Swords, on behalf of those interested in contesting the claim of Colonel McClintock's second wife, has asked me to pursue the following line of reasoning: He says that I must take the will first of all and substitute for the word 'wife' the name of Colonel McClintock's first wife, and then, he says, having done that, the testatrix has by her codicil only republished a will in which she has given a benefit to his first wife by name, and that, as his first wife predeceased the testatrix, the second wife cannot possibly take under that devise. It appears to me that to adopt such a course would not be to apply the rules as to republication with good sense and with discrimination, but to construe the will as though it had not been republished. I cannot substitute the Christian name of the first wife for the word 'wife,' unless I disregard the fact of the republication of the will and construe the will as though there had been no republication. What I have to construe is a will which has been republished, and which, as I say, is a will which the testatrix tells me expressed her wishes as they were at the date of the codicil. Approaching the document in that light, I find that the testatrix, knowing full well that Colonel McClintock's first wife was dead, has directed that this legacy of 5000*l.* shall be held for the benefit of Colonel McClintock, his wife and children. Now, he had no wife at that time; therefore, if those were the testatrix's wishes at the date of the codicil, the only person who could take under that provision would be, and is, the lady whom Colonel McClintock married after the testatrix's death in 1903." Those are the modern authorities, and it is contended that they cannot apply to this case, because if the will be construed the expression "my present lease" can only refer to the old lease which has expired. It is true that if the testator in his will had bequeathed to his daughter, "my

RUSSELL J. 1928 REEVES, *In re.* REEVES v. PAWSON.

lease of No. 1 Chesterfield Street, Mayfair, dated September 25, 1917," the republication of his will by the codicil would not have given her any benefit, because the old lease had expired; but the testator has bequeathed to his daughter "my present lease," an expression that exactly fits the circumstances that existed at the date of the codicil. If I follow the principle laid down in *In re Champion* (1) and *In re Fraser* (2), and applied in *In re Smith* (3) and *In re Hardyman* (4), and read this will and codicil as one document dated February 10, 1926, the date of the execution of the codicil, there is a bequest in favour of his daughter of "my present lease," the present lease being that dated December 31, 1923. Full effect can be given to that bequest, and the benefit of the lease passes to the testator's daughter under the testamentary disposition.

Solicitors: *Sydney E. Preston; Chapman-Walker & Shephard.*

(1) [1893] 1 Ch. 101.
(2) [1904] 1 Ch. 726.
(3) [1916] 1 Ch. 523.
(4) [1925] Ch. 287.

J. B. B. M.

REIGATE CORPORATION *v.* SURREY COUNTY COUNCIL.

RUSSELL J.

1928

Jan. 20, 25; *Feb.* 9.

[1926. R. 1133.]

Highway—Main Road through Tunnel—Repair of Tunnel—Liability of County Council to contribute towards Cost of Repair—Local Government Act, 1888 (51 & 52 *Vict. c.* 41), *s.* 11, *sub-s.* 2; *s.* 97.

In 1823 "Tunnel Road," Reigate, was constructed as a private road by S., on, through, and under his own lands. In order to make the road S. tunnelled under an existing footpath. In 1923 "Tunnel Road" became a main road, Reigate Corporation, S.'s successors in title to the soil through which the tunnel was driven, being the road authority. In 1924 it became necessary to repair the walls and roof of the tunnel, and the question was whether the Surrey County Council was liable to contribute towards the cost of the repair:—

Held, that the walls and roof of the tunnel either formed part of the highway or were necessary for its maintenance, and that the costs of their repair were costs within s. 11, sub-s. 2, of the Local Government Act, 1888, towards which the Council was bound to make an annual payment:—

Held, also, that even if S., having in 1823 tunnelled under an existing highway, became liable ratione nocumenti to repair the part of the tunnelled road under the highway, that liability did not descend to the Corporation under s. 97, of the Local Government Act, 1888, because the Corporation were not only S.'s successors in title but also a highway authority.

Special Case.

The questions raised by this special case related to a road at Reigate called "Tunnel Road," which ran north and south from the London Road into the Market Place, Reigate. The road was some two hundred and ninety yards in length and for a distance of about fifty-six yards it ran through a tunnel. The tunnel walls and roof consisted of brick, the roof being arched. The soil above the crown of the arch was about twenty feet deep.

"Tunnel Road" was constructed in 1823 by Earl Somers on, through, and under his own lands—namely, Castle Hill. It was constructed as a private road and the tunnel, with its walls and roof, was constructed at the same time. At that time an ancient highway, a footway, ran along and across part of Castle Hill. This footway passed over the extreme southern end of the tunnel, having on its southern edge the

RUSSELL J. 1928 REIGATE CORPORATION v. SURREY COUNTY COUNCIL.

south parapet wall of the tunnel. Tunnel Road continued to be a private road until 1858, in which year it would appear to have come under the control of the Turnpike Trustees as a result of a bargain with Earl Somers. According to the facts as alleged in paras. 11, 12 and 13 of the Special Case, Reigate on September 11, 1863, was created a municipal borough, and the mayor, aldermen and burgesses of that borough were incorporated by charter. On August 21, 1865, the Corporation resolved to adopt the Local Government Act, 1858. On June 4, 1866, the Corporation, by virtue of the powers conferred upon them by s. 41 of the Local Government Act, 1858, entered into an agreement with the Turnpike Trustees whereby the Corporation undertook the maintenance and repair of the road including the walls of the tunnel and banks, and the agreement contained a provision for its termination on twelve months notice given by either party. No such notice was given and the agreement continued in force until the expiration of the Turnpike Trust in 1881. After the Local Government Act, 1888, came into force until January 9, 1923, "Tunnel Road" was treated as a district assisted road; the Surrey County Council making voluntary contributions, under s. 11, sub-s. 10, towards the costs of its maintenance and repair. No repairs were during that period made to the walls or roof of the tunnel. "Tunnel Road" became a main road on January 9, 1923; and on October 13, 1923, the Reigate Corporation, in pursuance of s. 11, sub-s. 2, of the Act of 1888 claimed to retain the powers and duties of maintaining and repairing it. The Surrey County Council thereupon became liable to make to the Corporation an annual payment "towards the costs of the maintenance and repair and reasonable improvement connected with the maintenance and repair of such road."

In 1924 it became necessary to carry out certain repairs and works to the tunnel. The cost of carrying out the work came to 317*l.*

Since February 16, 1922, the Corporation had been owners of all the land on each side of the road and over the tunnel

with the exception that they did not own the property on the eastern side of the road from the southern end of the tunnel to the Market Place. On the soil over the tunnel there was a cottage, erected about the year 1867, which was now the property of the Corporation, and, in the walls of the tunnel there were doors and gates leading into vaults, owned by the Corporation, which led out of the tunnel in and under the adjacent soil.

Para. 23 of the special case asked: Whether in the circumstances aforesaid the said sum of 317*l.* is part of the costs of the maintenance and repair and reasonable improvement connected with the maintenance and repair of the said road toward which the County Council are required by s. 11, sub-s. 2, of the Local Government Act, 1888, to make an annual payment.

Maurice FitzGerald for the plaintiffs. The tunnel was constructed for the purpose of making the road. Either the tunnel forms part of the highway or the repair of the tunnel is necessary for the maintenance of the highway. In either case the cost of the repair of the tunnel is a cost towards which the County Council is bound to contribute under s. 11, sub-s. 2, of the Local Government Act, 1888. In *Reg.* v. *Inhabitants of Lordsmere* (1) a wall built on a slope to prevent earth falling on to a highway was held to be part of the highway, and in *Sandgate Urban Council* v. *Kent County Council* (2) the cost of repairing that which was not part of the highway, but which it was necessary to repair in order to prevent the highway being washed away, was held to be recoverable from the County Council under this sub-section.

R. A. Glen for the defendants. The Corporation are the highway authority for Reigate and as such bound to repair all highways repairable by the inhabitants at large within their district, and, secondly, they are the owners of the soil through which "Tunnel Road" runs, and the successors in title of Lord Somers. Sect. 97 of the Local Government Act,

(1) (1886) 54 L. T. 766. (2) (1898) 79 L. T. 425.

RUSSELL J. 1928 REIGATE CORPORATION v. SURREY COUNTY COUNCIL.

1888, preserves their liability in their second capacity for the maintenance and repair of the tunnel under the footpath. The Corporation are liable ratione nocumenti, because when Lord Somers for his own purposes made the "Tunnel Road" under the ancient footpath there was an obligation on him to construct the necessary works to prevent that footpath being undermined. That obligation was a continuing one on him and his successors in title. The works had not only to be constructed, they had also to be maintained: *Rex* v. *Kerrison* (1); *Hertfordshire County Council* v. *Great Eastern Ry. Co.* (2) That part of the tunnel which is not under the footpath comes within the class of case where a highway has been dedicated subject to an inconvenience and, as such, is repairable by the owner of the soil in order to prevent a public nuisance: *Tarry* v. *Ashton* (3); *Gully* v. *Smith* (4); *Silverton* v. *Marriott* (5); *Fisher* v. *Prowse* (6); *Warner* v. *Wandsworth Board of Works.* (7) Here the bricks and earth above the highway are the inconvenience, subject to which the highway has been dedicated. The bricks form no part of the road and the need for them is due to the soil above. Walls retaining highways form part of the highway, but walls retaining adjoining land do not: *Attorney-General* v. *Staffordshire County Council.* (8) In order to make a local authority liable to repair more than the surface of the road it must be shown that the repair is necessary for the protection of the road: see *Coverdale* v. *Charlton* (9); *Wandsworth Board of Works* v. *United Telephone Co.* (10) The repair was necessary for the maintenance of the road in *Sandgate Urban Council* v. *Kent County Council* (11), but here the tunnel is not necessary for the maintenance of the road which would be in a better condition if it were open to the sky.

Cur. adv. vult.

(1) (1815) 3 M. & S. 526.
(2) [1909] 2 K. B. 403.
(3) (1876) 1 Q. B. D. 314.
(4) (1883) 12 Q. B. D. 121.
(5) (1888) 52 J. P. 677.
(6) (1862) 31 L. J. (Q. B.) 212.
(7) (1889) 53 J. P. 471.
(8) [1905] 1 Ch. 336.
(9) (1878) 4 Q. B. D. 104.
(10) (1884) 13 Q. B. D. 904.
(11) 79 L. T. 425.

Feb. 9. RUSSELL J. The substantial question which I have to decide is this, whether costs incurred by the Reigate Corporation in keeping the roof, walls, and parapets of the tunnel in repair are costs within the meaning of s. 11, sub-s. 2, of the Local Government Act, 1888.

The Corporation contend that the walls and roof of the tunnel are part of the road having been constructed simultaneously with the road and as part and parcel of it. Alternatively they say that if the walls and roof of the tunnel do not form part of the road they are works which it is necessary to maintain in order efficiently to maintain and repair the surface of the road, and the cost of such maintenance is properly part of the cost of the maintenance and repair of the road.

The Council, on the other hand, say that the walls and roof of the tunnel cannot be said to be and are not part of the road, nor are they works erected for the protection of the surface of the road, or for any other purpose than the support of the land above. The case, they say, is simply one of a highway having been dedicated with an existing inconvenience attached thereto, and that the authorities establish the proposition that all repairs required to be done to such an existing inconvenience must be done by its owner, that is by the Corporation as the owner of the adjacent land which it supports.

A subsidiary point was also urged—namely, that in no event could the Council be liable to repair the southerly portion of the tunnel which supports the ancient footpath.

I will first of all deal with the main point. There is no direct authority that I can find or that has been cited to me in relation to highways running through tunnels, and no doubt much must depend upon the facts in each case. Here the landowner made the road on his own land, in part running through it by means of a tunnel. Simultaneously he erected the brick walls and roof. These ensure that no part of the soil (which would otherwise form the walls and roof of the tunnel) can fall on to the surface of the road. The fall of large quantities of soil would choke up and obstruct the

RUSSELL J.
1928
REIGATE CORPORATION v. SURREY COUNTY COUNCIL.

road; even the risk of the fall of smaller quantities would deter people from using the road.

There is authority for the view that a wall supporting a road made on the slope of a hill, forms part of the roadway: *Reg.* v. *Inhabitants of Lordsmere.* (1) On the same principle I can see no logical reason for holding that a wall whose purpose is to keep the soil on the higher levels of the slope from coming on to the road should not also be held to be part of the road. It is suggested that the case of *Attorney-General* v. *Staffordshire County Council* (2) is an authority to the contrary. I do not so read it. There the road was cut on the side of a hill and had walls on each side. The decision was simply that upon the evidence in the case neither the upper or lower walls were out of repair, and that the Court would not make any order as to what steps the road authority should take for the purpose of keeping their roads in repair. There being no authority which prevents me from so holding, I am prepared to hold and do hold that the walls and roof of the tunnel which were erected simultaneously with the making of the road and which operate to keep and are necessary to keep the surface of the road free from that which would or might otherwise obstruct it, may properly be said to form part of the roadway.

If I am wrong in this, another view is open. If the walls and roof are not part of the road, yet they may constitute something, apart from the road, which it is necessary to maintain and repair for the purpose of maintaining and repairing the road; something which if allowed to get into disrepair may bring about the obstruction and disrepair of the highway. In other words the case is analogous to the *Sandgate* case (3), the repair and maintenance of the walls and roof of the tunnel corresponding to the repair and maintenance of the sea wall and groynes in that case. Here in my opinion the maintenance and repair of the tunnel walls and roof are necessary for the maintenance and repair of the road even though the walls and roof form no part

(1) 54 L. T. 766. (2) [1905] 1 Ch. 336.
(3) 79 L. T. 425.

of the road; and the costs of such maintenance and repair are costs within s. 11, sub-s. 2, of the Act of 1888.

I can find no support in the authorities cited for Mr. Glen's proposition that the walls and roof of this tunnel must be regarded as an inconvenience, subject to which the road was dedicated as a highway, and that the owner of the inconvenience must repair it. The cases cited by him seem to me to have no bearing upon, or relation to, a case like the present one. He cited several authorities in support of his contention, of which the principal one and the real basis of his proposition appeared to be *Tarry* v. *Ashton*. (1) All that was decided in that case was that the owner of a heavy lamp attached to his house and projecting over the highway was liable in damages to a passer-by upon whom, owing to its being out of repair, it fell; and that upon the footing that it was his duty to keep in repair the lamp which for his own purposes he kept projecting over the highway. In *Fisher* v. *Prowse* (2) it was no doubt held that a highway may be dedicated subject to existing obstructions, such as cellar flaps and steps, and that the owner of the obstruction is not liable for damages caused by it, provided he maintains it in its original condition as to repair and as to extent of obstruction. Nor, as was pointed out by Denman J. in *Warner* v. *Wandsworth Board of Works* (3), is the road authority bound to remove the obstruction. But nowhere in the authorities cited do I find any justification for the view that the walls and roof of this tunnel constitute an inconvenience or obstruction subject to which the highway was dedicated. As already indicated I take the view upon the facts of this case that they either form part of the highway or are necessary for the maintenance of the highway.

There remains for consideration a subsidiary point raised on behalf of the Surrey County Council, in regard to that portion of the southern end of the tunnel over which the old footpath runs. That arises under s. 97 of the Local Government Act, 1888, which runs thus: "Nothing in this

(1) 1 Q. B. D. 314. (2) 31 L. J. (Q. B.) 212.
(3) 53 J. P. 471.

RUSSELL J. 1928 REIGATE CORPORATION v. SURREY COUNTY COUNCIL.

Act with respect to main roads shall alter the liability of any person or body of persons, corporate or unincorporate, not being a highway authority, to maintain and repair any road or part of a road." The contention is that Earl Somers having in 1823 tunnelled under an existing highway, the old footpath, he thereupon became liable ratione nocumenti to repair that part of the tunnelled road which went under the old footpath, and that that liability is preserved by s. 97 and rests with his successors in title to the soil—namely, the Corporation. The answer to this appears to me to be that s. 97 does not preserve the liability ratione nocumenti in the present case because the Corporation are not only successors in title to Lord Somers but are also a highway authority. Their liability to repair that portion of the tunnel does not arise ratione nocumenti, but arises in the same way as their liability in regard to the rest of the tunnel.

The result is that my answer to the question raised by para. 23 of the Special Case is in the affirmative. I accordingly declare that the defendants are liable to make an annual payment towards the costs incurred by the plaintiffs from time to time in keeping the roof, walls and parapets of the said tunnel in repair, and I direct judgment to be entered for the plaintiffs for the sum of 317*l.* without costs.

Solicitors: *Westbury Preston & Stavridi, for Grece & Patten, Redhill; Wyatt & Co., for T. W. Weeding, County Hall, Kingston-on-Thames.*

J. B. B. M.

In re HAYWARD.

MERSON *v.* HAYWARD.

CLAUSON J.

1927

July 22, 27.

[1927. H. 1775.]

Law of Property—Land—Undivided Shares—Trust for Sale—Settlement of undivided Share—Trustees Persons interested in the Land—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 35—*Law of Property (Amendment) Act*, 1926 (16 *&* 17 *Geo.* 5, *c.* 11), *Schedule.*

Trustees for sale of an aliquot part of the land held in undivided shares are "persons interested" within the meaning of s. 35 of the Law of Property Act, 1925.

In re Cliff Contract [1927] 2 Ch. 94 followed.

On December 31, 1925, the entirety of the land in question in this summons was held in fee simple in 15,120 equal undivided shares. Of these 12,525 were vested in the two plaintiffs at law as the trustees of a conveyance of 1911 on trust for sale and to hold the proceeds of sale and the rents and profits till sale on the trusts declared by a deed of even date. A further 2205 shares were vested in the two plaintiffs as trustees of a settlement of 1906 (hereinafter called "the Colson settlement"). The remaining 390 shares were vested in the two plaintiffs as trustees of a settlement of 1898. Although the 1898 settlement had then come to an end, there had been no conveyance by the plaintiffs to the persons entitled to the shares comprised in that settlement. Under the Colson settlement certain shares to which the defendant, K. P. Colson, was entitled were conveyed to the trustees thereof in trust for sale, and as to the proceeds of sale upon trust to pay the income thereof to K. P. Colson during her life, and (in the events which have happened) to stand possessed of the corpus in trust for the issue of her marriage as she and her husband should by deed jointly appoint, and in default of appointment as the survivor should by deed or will appoint, and in default of any such appointment in trust for all the children of the marriage in equal shares. Under that settlement there was personalty settled not being part

CLAUSON J. 1927 HAYWARD, *In re.* MERSON *v.* HAYWARD.

of the property in question in this summons. The husband died on February 3, 1919. By the conveyance of 1911 all the parties at law or in equity interested conveyed the 12,525 shares to the trustees in fee simple discharged from the trusts and powers of certain wills and from the trusts and powers of a certain settlement, and from mortgages and all claims thereunder upon the trusts, and subject to the powers thereinafter declared and contained.

On January 1, 1926, the entirety of the land vested in the Public Trustee as trustee under Part IV. of Sch. I. to the Law of Property Act, 1925. By an order of the Court dated July 11, 1927, the two plaintiffs and the defendant Hayward, a beneficiary under the 1911 conveyance, were appointed statutory trustees of the entirety of the land under Part IV. The originating summons asking for such appointment was adjourned into Court for argument on the following questions —namely: (1.) That it might be determined whether the trustees as trustees of the entirety were (after payment of outgoings as provided by s. 35 of the Law of Property Act, 1925) to pay the share of net rents and profits until sale attributable to the 2205 shares to the defendant K. P. Colson during her life, or whether they were to pay such share of the net rents and profits to the trustees of the Colson settlement to be applied by them as income of the trust premises thereby settled; (2.) that it might be determined whether the trustees were (after payment of costs as provided by s. 35) to pay over to the trustees of the Colson settlement, so long as the trusts thereof were subsisting, such part of the net proceeds of sale from time to time arising from sales of the lands as was attributable to the 2205 shares, or whether they were themselves to retain such part of the proceeds of sale and to invest and otherwise deal with the same on the trusts, with and subject to the powers and provisions by and in such settlement declared and contained.

Underhay for the defendant Hayward. A settlement by way of trust for sale is not a settlement within the meaning of s. 35 of the Law of Property Act, 1925, as amended by

the Law of Property (Amendment) Act, 1926. Land held on trust for sale is not settled land: Settled Land Act, 1925, s. 1, sub-s. 7, as amended. Whether that be so or not it would not wholly suffice to decide this case on that point. The substantial question is whether trustees for sale are "persons interested" in the land within the meaning of s. 35. The decision in *In re Cliff Contract* (1) was on another part of the Law of Property Act, 1925—namely, Part IV. of Sch. I.

Nicholson Combe for the settlement trustees. The point involved is whether the appointment of trustees of the entirety under Sch. I., Part IV., para. 1, sub-cl. 4 (iii.), of the Law of Property Act, 1925, has displaced the Colson trustees, and abrogated all the trusts, powers, and discretions of the latter under the Colson settlement. This is the very point which Astbury J. in *In re Cliff Contract* (2) expressly left at large. I submit that the Colson trustees are not displaced, further than is necessarily involved by the vesting of their shares (with all the other shares making up the entirety) in the trustees of the entirety on the statutory trusts, as defined by s. 35 of the Act. The Colson trustees would be "persons interested" in the land within the meaning of para. 1, sub-cl. 11 (i.), of Part IV. of Sch. I. (see *Darlington* v. *Darlington* (3)), and also within the meaning of para. 1, sub-cl. 4 (iii.) (iv.), of Part IV.: *In re Cliff Contract.* (1) That of course does not necessarily mean that they are persons interested in the land under s. 35, whose rights the entirety trustees are to give effect to. Under s. 26, sub-s. 3, trustees for sale (i.e., the present entirety trustees) must consult persons beneficially interested, which would not mean the Colson trustees. The present case comes within the amendment in the Law of Property Act, 1926, to s. 35 of the Act of 1925. The Colson settlement was a settlement by trust for sale under s. 63 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38). "Settlement" in s. 35 (as amended) includes a settlement by trust for sale under s. 63 of the Settled Land

(1) [1927] W. N. 121; since reported [1927] 2 Ch. 94.
(2) [1927] 2 Ch. 94, 98.
(3) [1926] W. N. 192.

CLAUSON J. 1927 HAYWARD, *In re.* MERSON *v.* HAYWARD.

Act, 1882 (see Law of Property Act, 1925, s. 205, sub-s. 1 (xxvi.), and Settled Land Act, 1925, s. 117, sub-s. 1 (xxiv.)). There is other property in the Colson settlement, and the trusts of that other property are still subsisting; therefore all the conditions required by s. 35 (as amended) are fulfilled, and a part of the trusts of the entirety trustees is, under the amendment to s. 35, a trust to hand over to the Colson trustees the share attributable to the Colson fractions in the proceeds arising from time to time from sales of the land.

G. P. Slade for the defendant K. P. Colson.

H. V. Batchelor for infant remaindermen under the Colson settlement.

CLAUSON J. I find in *In re Cliff Contract* (1), a decision of Astbury J., that, where land is held on the statutory trusts, the beneficial interests being in undivided shares, the expression "persons interested" is an expression which is not confined to persons beneficially interested, but includes persons interested as being trustees for sale of some of the undivided shares. I follow that decision, and I therefore declare that the income attributable to the 2205 shares should be paid to the trustees of the Colson settlement, to be applied by them as income of the trust premises thereby settled, and that such part of the net proceeds of sale from time to time arising from sales of land as is attributable to the 2205 shares should be paid over to those trustees, so long as the trusts of the Colson settlement are subsisting.

Solicitors for all parties: *Iliffe, Sweet & Co.*

(1) [1927] W. N. 121; since reported [1927] 2 Ch. 94.

P. J. B.

In re DRAYCOTT SETTLED ESTATE.

TOMLIN J.

1927

Nov. 15, 16, 23; Dec. 20, 21.

[1927. D. 1891.]

Settled Land—Compound Settlement—Jointure Rent-charges—Termination of —Effect on compound Settlement—Purchase of Lands out of Residuary Personal Estate or proceeds of Sale of Land so purchased—Form of Conveyance to Trustees—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 3.

Trustees of a will purchased certain estates, subject to jointure rent-charges created by the V. settlements. On January 1, 1926, the estates were held subject to a compound settlement, constituted by the will, the V. settlements, and an indenture of 1907. Early in 1927, on the death of the jointress, the last of the jointure rent-charges determined.

Held, that on the death of the jointress the compound settlement, comprising the V. settlements, ceased.

Held, further, that the proper form now for a conveyance, whether of lands to be purchased out of moneys forming part of the residuary personal estate of the testator, or out of the proceeds of sale of lands so purchased, ought to be in the form of a conveyance creating a settled estate, and not in the form of a conveyance creating a trust for sale.

By his will the testator, who died on March 27, 1896, settled certain real estates in such manner that, in the events which have happened, the applicant was tenant for life thereof in possession, and his daughter, the respondent, T. H. Childs, an infant, was tenant in tail in remainder, though her interest was liable to be deferred to those of other persons if and when such other persons came into existence. By the will the testator's residuary personal estate was settled upon trust to invest in or upon any of the investments mentioned therein, or with the consent in writing of the tenant for life or tenant in tail for the time being of the testator's real estate if of full age, and if there should be no such person, then at the absolute discretion of his trustees in the purchase of freehold or copyhold lands in possession or subject to leases at improved rents in Great Britain, with power with such consent and at such discretion from time to time to alter and vary any such investments for other or others of a like nature, and to pay the income of his residuary personal estate to the person actually in possession or receipt of the rents of the real estate devised by the will, but subject to and in accordance with the proviso as to vesting

TOMLIN J. 1927 DRAYCOTT SETTLED ESTATE, *In re.*

of such income therein contained, and so that his residuary personal estate should not absolutely vest in any person thereby made tenant in tail general, unless such person should attain the age of twenty-one years, and so that such residuary personal estate should devolve and remain as if the same had been and formed part of his real estate, and had been thereby devised and settled accordingly. After the testator's death the trustees of the will from time to time invested portions of the residuary personal estate in the purchase of real estate.

By a conveyance dated December 12, 1899, and executed to give effect to the first of such purchases, the property purchased (called Gorsty Birch Farm) was conveyed to the trustees (therein called "the purchasers") to hold unto the purchasers, their heirs and assigns, as joint tenants to the uses and upon the trusts and with and under and subject to the powers, provisions, and agreements to and by the testator's will declared and contained of and concerning the real estate thereby settled, or such of them as were then subsisting and capable of taking effect. The second purchase was made subject to certain jointure rent-charges arising under family settlements of the previous owners, the Vavasour family, but with the benefit of an indemnity against such rent-charges. By a conveyance dated January 31, 1907, by which the second purchase (known as the Draycott estate) was carried into effect, the Draycott estate was conveyed unto the trustees (therein called "the purchasers") to hold the same unto and to the use of the purchasers, their heirs and assigns, free from all rights and equity of redemption, under certain mortgages, but subject, together with other hereditaments, to the rent-charges above mentioned, but indemnified against the same in manner provided by a certain indemnity deed upon trust that the purchasers or the survivors or survivor of them or other the trustees or trustee for the time being of the conveyance should, at the request in writing of the person of full age who should for the time being be tenant for life or tenant in tail of the real estate devised by the testator's will, or if there should be no such

person, then at the discretion of the trustees or trustee, sell the hereditaments thereby assured or any part or parts thereof, and should stand possessed of the net moneys to arise from every such sale and of the rents and profits of such hereditaments until the same respectively should be sold upon the same trusts and with and subject to the same powers and provisions, including the power of purchasing hereditaments, as the money laid out in the purchase of the hereditaments so sold and the income thereof would have been subject to if the same had not been so laid out. By a conveyance dated July 29, 1907, the property then purchased and situate at Fulford Dale, was conveyed to the trustees (therein called "the purchasers") to hold the same unto and to the use of the purchasers, their heirs and assigns, free from all claims under certain mortgages, upon the trusts, and subject to the powers, provisions, declarations, and agreements declared and contained by the testator's will concerning the real estate thereby settled, or such of them as were then subsisting and capable of taking effect.

By an order of Eve J. dated November 25, 1908, the Court expressed the opinion that no compound settlement of the Draycott estate was created by the testator's will and the conveyance of January 31, 1907, and it was ordered, pursuant to s. 7 of the Settled Land Act, 1884, that the powers conferred upon a tenant for life by s. 63, together with ss. 6 to 13 of the Settled Land Act, 1882, be exercised by the present applicant with regard to the Draycott estate.

By a subsequent order made by Russell J. on July 18, 1921, the applicant was authorized to exercise, with regard to the Draycott estate, further Settled Land Act powers. Early in 1927 the last of the jointure rent-charges, subject to which the Draycott estate was conveyed to the trustees, determined. All the settled estates were now to be sold, and the question arose how, in the events which had happened, and having regard to the forms of the conveyances and the recent legislation, a title could now be made. The summons asked whether, notwithstanding the death of the jointress, the compound settlement constituted by (1.) the indenture

TOMLIN J. 1927 DRAYCOTT SETTLED ESTATE, *In re.*

of August 24, 1886, a Vavasour settlement; (2.) the indenture of November 11, 1902, a Vavasour settlement; (3.) the will and codicil; and (4.) the indenture of January 31, 1907, was or was to be deemed to be a subsisting settlement for the purposes of the Settled Land Act, 1925. Whether, notwithstanding the death of the jointress, the compound settlement constituted by (1.) an indenture of June 23, 1859; (2.) an indenture of February 4, 1902, was or was to be deemed to be a subsisting settlement for the purposes of the Settled Land Act, 1925, and, if so, who were the trustees of such settlement who should execute a vesting deed. The hearing of a further question was adjourned.

Vaisey K.C. and *Tillard* for the applicant. Assuming that the land here was not held upon trust for sale, it was on January 1, 1926, subject to a compound settlement, consisting of the Vavasour settlements, the conveyance of January 31, 1907, and the will, by virtue of s. 3 of the Settled Land Act, 1925. On the death of the jointress, however, the compound settlement, comprising the Vavasour settlements, under which the jointure rent-charges arose, came to an end by virtue of s. 3 (*a*). On her death s. 3 ceased to apply, and s. 17 came in.

J. V. Nesbitt for the trustees and the indenture of February 4, 1902. Since the death of the jointress, the settlement, subsisting by virtue of s. 3, is the settlement created by the will, and the vesting can be executed by the trustees of the will.

Cleveland-Stevens for the infant tenant in tail in remainder.

C. J. Radcliffe for persons interested in remainder in the settled hereditaments.

A. Bromet and *Shufeldt* for other parties.

Nov. 23. TOMLIN J. All the settled estates are now to be sold, and the question arises how, in the events which have happened and having regard to the forms of the conveyances and the recent legislation, a title can now be made. For the moment I am dealing only with the title to the Draycott estate. But for the former rent-charges on

that estate there would be no difficulty. A title could, I understand, be made under the conveyance of January 31, 1907, and the will, in such a way as to cover the case whether there is a trust for sale or whether there is not.

It is said, however, that, assuming the land is not held upon trust for sale, s. 3 of the Settled Land Act, 1925, applies, and that although the rent-charges are at an end and there is no interest prior to the interests under the testator's will to be overriden, yet by reason of the estate having been once subject to the rent-charge, a compound settlement constituted by the Vavasour instruments under which the rent-charges arose, the conveyance of January 31, 1907, and the will must be deemed to be still on foot under the section or at any rate is dormant, and (to use the language employed by Russell J. in *In re Lord Alington and London County Council's Contract* (1)) is capable of being awakened by the embrace of that section.

If this is the result of the language employed in the section under consideration, it is, in the present case, an absurd result, for additional difficulty and expense will be occasioned without any advantage at all being gained.

Sect. 3 of the Act, amended by the Law of Property (Amendment) Act, 1926, by the addition of the words "not held upon trust for sale," reads as follows: "Land not held upon trust for sale which has been subject to a settlement shall be deemed for the purposes of this Act to remain and be settled land, and the settlement shall be deemed to be a subsisting settlement for the purposes of this Act so long as: (*a*) any limitation, charge, or power of charging under the settlement subsists, or is capable of being exercised; or (*b*) the person who, if of full age, would be entitled as beneficial owner to have that land vested in him for a legal estate is an infant."

Now I have no doubt, having regard to s. 1 of the Act, that the Draycott estate has been subject to a compound settlement constituted by the Vavasour instruments and the conveyance of January 31, 1907, and that such settlement

(1) [1927] 2 Ch. 253, 260.

TOMLIN J. 1927 DRAYCOTT SETTLED ESTATE, *In re.*

was in existence after the commencement of the Act. The question is whether it is still a subsisting settlement notwithstanding the determination of all the charges under the Vavasour instruments. The answer must depend upon whether it can be said of it that any of the conditions mentioned either in sub-cl. (*a*) or sub-cl. (*b*) of s. 3 still continue.

Sub-cl. (*b*) seems to have no application to this case. There is certainly at present no infant who, if of full age, would be entitled as beneficial owner to have the land vested in him for a legal estate.

Is there, however, within the meaning of sub-cl. (*a*) any limitation, charge or power of charging "under the settlement" subsisting or capable of being exercised? The words "under the settlement" must mean under the settlement deemed to be subsisting, that is, in this case, under the compound settlement. In one sense it may be said that where there is a compound settlement every limitation, charge, or power of charging under any one of the instruments making up the compound settlement is under the compound settlement, but in another sense it is only where it is necessary to resort to the compound settlement for overriding the limitation charge or power that such limitation, charge or power can fairly be said to be a limitation, charge or power under the settlement.

Sect. 3 is a section to facilitate and not to impede dealings with the land, and in my opinion the expression "under the settlement" is used in sub-cl. (*a*) in the second sense which I have indicated.

It follows, therefore, in the present case, that the compound settlement, comprising the Vavasour instruments, ceased when the joint rent-charges came to an end, and is not, under s. 3, now to be deemed to be a subsisting settlement. If this land to-day is settled land, it is settled land under or by virtue only of the instrument or instruments which created the existing limitation, charges and powers, and the earlier Vavasour instruments may be disregarded.

Dec. 20, 21. The further question on the summons now came before the Court for decision—namely, whether any

lands hereafter to be purchased out of moneys forming part of the residuary personal estate of the testator, or out of proceeds of sale of lands heretofore so purchased ought to be conveyed to the trustees of the will upon trust for sale, or ought to be comprised in an appropriate vesting deed as provided by s. 10 of the Settled Land Act, 1925, or how otherwise the same ought to be conveyed and dealt with.

Vaisey K.C. and *Tillard.* The proper method of conveying land here is by supplemental deed, the tenant for life being treated as owner in fee, and having full powers to convey. The trustees having been authorized to invest either in the purchase of realty or personalty, the beneficial interests should be treated as realty or as personalty according to the choice of investments made: see Vaizey on Settlements, vol. i., p. 493: *Rich* v. *Whitfield* (1); *Atwell* v. *Atwell.* (2) If proceeds of residuary personal estate are to be invested in purchase of land, there must be an express direction in the settlement: s. 32 of the Law of Property Act, 1925.

Radcliffe. If there are no trusts for sale, any land purchased with capital moneys becomes inalienably land, and cannot be sold by the trustees, but only by the tenant for life. Settled Land Act, 1925, ss. 77, 78. The Act converts personalty into land: s. 10.

Cleveland-Stevens. It is not clear that s. 77 applies to this at all. It is more likely that s. 32 of the Law of Property Act applies.

TOMLIN J. Prima facie, apart from any special statutory provision, I think that a direction, such as that contained in this will, to invest in personal investments or real estate, with power to vary, has this effect, that the property is land or personal estate according to the state of investment in which it is at the time; so that, strictly speaking, it would not be proper to convey the land to the trustees in a form which would stereotype it in a particular way. Before the Conveyancing Act of 1911, at any rate,

(1) (1866) L. R. 2 Eq. 583. (2) (1871) L. R. 13 Eq. 23.

TOMLIN J. 1927 DRAYCOTT SETTLED ESTATE, *In re.*

there seems to have been nothing to prevent the trustees of a will such as this having the property conveyed to them in a form which would give effect to the intention of the testator—subject only to this, that if it was conveyed to them with power to sell, as distinct from a trust for sale, then it might well be that, having regard to the provisions of the old Settled Land Acts, it must always remain real estate, because the only sales which would be effective would be sales by the tenant for life under the Acts, and the proceeds of those sales would be capital moneys, and those capital moneys would be affected with the character of real estate. In regard to settlements of personal estate coming into operation after the Act of 1911 and containing a power to invest in the purchase of land, the conveyance where such a purchase was made probably ought to have been in the form of a trust for sale. In either of these two cases it might be said that the legislature had effectually secured that the intention of the testator should not be carried out. But that, of course, is of minor importance. As matters stand to-day however I think that there is little doubt that the proper form for a conveyance, whether on a purchase of land by means of money arising from the proceeds of sale of land formerly purchased out of money forming part of the residuary estate, or whether on a purchase of land by means of money forming part of the residuary estate and not previously invested in the purchase of land, ought to be in the form of a conveyance creating a settled estate and not in the form of a conveyance creating a trust for sale. The consequences are statutory consequences. The trustees thereby do their best, and that their best is not effectual is not their fault.

Solicitors: *Cunliffe, Blake & Mossman, for Knight & Sons, Newcastle, Stafford; Torr & Co., for Geo. Bromet & Son, Tadcaster; Gibson & Weldon, for Hand, Morgan & Co., Stafford.*

P. J. B.

In re COWARD, CHANCE AND COMPANY.

RUSSELL J.

1928 *Jan.* 20.

[1927. C. 1084.]

Costs—Taxation—Solicitors' Charges—Mortgage—Further Charge—Investigation of Title—General Order under Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *cl.* 2 (*a*), *Sch. I., Part I., r.* 10.

In 1897 the trustees of the will of Captain J. and Mrs. J. executed a consolidating mortgage to the Commercial Union upon certain securities to secure a certain amount. In 1924 and 1926 the Commercial Union made further advances to Mrs. J., who was the owner in fee, upon the same securities. Mrs. J. died in 1926. In January, 1927, her trustees applied for and were granted a further advance on the same securities by the Commercial Union, whose solicitors had attended to the previous transactions. The deed secured an immediate advance, and it also secured all the previous existing securities, although the old securities had been kept on foot for the purpose of preserving priorities, and there was a new proviso for redemption. The solicitors to the Commercial Union carried in a bill for taxation, the charges being according to the scale in Sch. I., Part I., of the General Order under the Solicitors' Remuneration Act, 1881, for "investigating title and preparing and completing deed of security." The Taxing Master took the view that Sch. I. did not apply, and taxed the bill accordingly.

On a summons by the solicitors to review the taxation:—

Held, that there had been an "investigation of title" within the meaning of Sch. I., and that the matter must be referred back to the Taxing Master.

THIS was an application by solicitors asking that objections raised by them to the taxation of costs might be allowed and the matter referred back to the Taxing Master to vary his certificate, and it raised the question whether, in regard to a certain document, the acting solicitors were entitled to charge on the scale provided by cl. 2 (*a*) of the General Order and Sch. I., Part I., thereto, made in pursuance of the Solicitors' Remuneration Act, 1881, or whether the clause should not apply, as provided by r. 10 of Sch. I. to the Order. Clause 2 (*a*) provided that "In respect of sales, purchases, and mortgages completed, the remuneration of the solicitor having the conduct of the business, whether for the vendor, purchaser, mortgagor, or mortgagee is to be that prescribed

RUSSELL J. 1928 COWARD, CHANCE & CO., *In re.*

in Part I. of Schedule I. to this Order," and Sch. I., Part I., provided that a mortgagee's solicitor should be entitled to the scale of fees therein provided for, for investigating title to freehold, copyhold, or leasehold property, and preparing and completing mortgage. Rule 10 provided that " The above scale as to mortgages is to apply to transfers of mortgages where the title is investigated, but not to transfers where the title was investigated by the same solicitor on the original mortgage or on any previous transfer ; and it is not to apply to further charges, where the title has been so previously investigated."

In 1897 the trustees of the will of Captain Jenner and Mrs. Jenner executed a consolidating mortgage to the Commercial Union upon the Wenvoe Castle Estate and shares in Aire and Calder Navigation Company to secure 111,000*l.* In 1924 and 1926 the Commercial Union made further advances to Mrs. Jenner, who was the owner in fee, upon the same securities. The amounts so advanced varied from time to time, and at the date of Mrs. Jenner's death, October 1, 1926, the amount outstanding was 75,542*l.* In January, 1927, the trustees of Mrs. Jenner applied to the Commercial Union for an advance of 64,458*l.*, upon the securities of the properties already mortgaged to them, and the title to which had already been investigated by the solicitors to the Commercial Union, the present applicants. This was ultimately arranged by a deed executed on March 18. This deed secured an immediate advance of 17,000*l.*, and it secured any further sums advanced up to 64,458*l.* It secured all the previous existing securities, although the old securities had been kept on foot for the purpose of preserving priorities, and there was a new proviso for redemption. Subsequently, the present applicants delivered a bill, and the bill was a scale fee bill plus disbursements. It was for " professional charges in connection with an advance to the executors of the will of the late Mrs. L. F. Jenner upon security of the Wenvoe Castle Estate . . . . and other property, investigating title and preparing and completing deed of security in your favour to secure 17,000*l.* and further advances up to 64,458*l.*

in all and interest thereon as per authorised scale." An order was made for the taxation of the bill, and a dispute arose as to whether it was a case within Sch. I. The Taxing Master took the view that it was not within Sch. I., and taxed the bill accordingly. The applicants objected to the disallowance, and gave their reasons, and subsequently made this application.

Norman Daynes for the applicants. The question here is whether the case is one of the investigation of title and of preparing and completing a mortgage, or is a case of a further charge. The applicants had to investigate the will of Mrs. Jenner, who were her trustees, and to ascertain what powers they had. It was a fresh mortgage and not a further charge within r. 10, and the applicants were entitled to scale fees: *Ex parte Mayor of London* (1); *Earl of Aylesford* v. *Earl Poulett.* (2) The form of the 1927 instrument shows that instead of being a further charge, it is in form a covenant to pay the whole of the money (due under the old mortgage and the new), a fresh conveyance by way of legal charge of all the property comprised, and a declaration that it is to act as one consolidating mortgage. A further charge is tacked on to an existing security. This is a further mortgage.

Nicholson Combe for the respondents. This is a further charge within r. 10, because the title had been already investigated by the same solicitors. Apart from r. 10, the applicants do not come within the Schedule, because they did not do the work the Schedule requires. In construing the General Order in non-contentious matters the Court looks at the substance of the work done: *In re Webster and Jones' Contract* (3); *In re Baker* (4); *In re Lacey & Son.* (5) In substance what the mortgagees were relying on was the old title, although there had been a death. It is a half-way case that does not come within Sch. I., but is relegated by cl. 2 (*c*) of the General Order to Sch. II., which

(1) (1887) 34 Ch. D. 452, 457.
(2) [1891] 1 Ch. 248.
(3) [1902] 2 Ch. 551.
(4) [1912] 2 Ch. 405.
(5) (1883) 25 Ch. D. 301, 309.

RUSSELL J.
1928
COWARD, CHANCE & CO., *In re.*

provides a separate scale of fees for drawing and perusing documents, and gives the Taxing Master power to increase or diminish such charges if for any special reasons he shall think fit.

RUSSELL J. The short point in this case is whether the bill as carried in is a scale charge under Sch. I. to the Solicitors' Remuneration Act, 1881, or whether the matters in question do not fall within s. 1, in which case it would be merely a question of an itemized bill. The amount of the difference between the two bills is a substantial amount.

An order was made for the taxation of the bill, and a dispute arose as to whether it was a case within Sch. I. at all. The Taxing Master took the view that it was not within Sch. I. The applicants objected to the disallowance, and gave their reasons. I need not read the objections or the answers; they are the arguments addressed to me on one side and the other. In substance the question is whether the work has been done which Sch. I. provides for. It is necessary to glance at the provisions of the General Order and the Schedule and the Rules which go with the Schedule. The General Order by cl. 2 provides that "Subject to" a certain exception which is immaterial, "the remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages, settlements and other matters of conveyancing, and in respect of other business, not being business in any action, or transacted in any court, or in the chambers of any judge or master, is to be regulated as follows, namely: (*a*) In respect of sales, purchases, and mortgages completed, the remuneration of the solicitor having the conduct of the business, whether for the vendor, purchaser, mortgagor, or mortgagee is to be that prescribed in Part I. of Schedule I. to this Order, and to be subject to the regulations therein contained"—that is, contained in Part I. of Sch. I.: "(*b*) In respect of leases and agreements for leases: (*c*) In respect of business not hereinbefore provided for, connected with any transaction, the remuneration for which, if completed, is hereinbefore, or in

Schedule I. hereto, prescribed, but which is not in fact completed, and in respect of settlements, mining leases or licences, or agreements therefor, reconveyances, transfers of mortgage, or further charges, not provided for hereinbefore or in Schedule I. hereto, assignments of leases not by way of purchase or mortgage, and in respect of all other deeds or documents, and of all other business the remuneration for which is not hereinbefore, or in Schedule I. hereto prescribed, the remuneration is to be regulated according to the present system as altered by Schedule II. hereto." Then Sch. I., Part I., deals with the scale of charges by the mortgagee's solicitor, and those include two heads: (1.) "For negotiating loan"—that does not arise here, and (2.) "For investigating title to freehold, copyhold or leasehold property and preparing and completing mortgage." Then there is set out the scale fee. Pausing there for a moment, there might be a doubt as to whether the scale fee of the mortgagee's solicitors would include the case of transfer of a mortgage or the case of a further charge, but that matter is set beyond doubt by r. 10, which provides as follows: "The above scale as to mortgages is to apply to transfers of mortgages where the title is investigated, but not to transfers where the title was investigated by the same solicitor on the original mortgage or on any previous transfer, and it is not to apply to further charges, where the title has been so previously investigated." I read that as meaning that if it cannot be said that the title has been so previously investigated, then that the scale does apply to further charges. The parties agree that the deed which was executed by the executors of Mrs. Jenner was a further charge either for 17,000*l.* or for the larger sum of 64,000*l.*, and the question upon which the case really turns is whether there was an investigation of title by the same solicitors within the meaning of this rule? In my opinion, although the solicitors are the same, this was not an investigation of a title which had been previously investigated. The meaning of this rule is, that the title in question is to be the title of the person who is coming forward to borrow the money. Although the same solicitors may, down to a previous date, have

RUSSELL J. 1928 COWARD, CHANCE & CO., *In re.*

investigated the title to the property in the hands of A., when B., although claiming under A., comes forward to borrow money, they have to investigate B.'s title to the property; it is impossible to say within r. 10 that the title has been so previously investigated. Take the present case as an example. It was absolutely necessary for the solicitors to the Commercial Union, before they could advise their clients to make this large advance, to satisfy themselves as to the powers of the executors and trustees to make a good title. For that purpose they would have to be satisfied in the first place that Mrs. Jenner was dead; in the second place what the contents of her will were, and that the trustees had proved the will, and it would not be until they had conducted that investigation of title that they could safely say to their clients: "You may lend the 64,000*l.*" Mr. Combe has argued that I am to take a broad view, and to hold that, because the solicitors were familiar with the title down to and in Mrs. Jenner, therefore, there was in substance no investigation of title since Mrs. Jenner's title, because it only involved being satisfied as to her death and as to the contents of her will, in other words, that the investigation of title here suggested was minute and involved very little work. I feel precluded from taking what is called the broad view. I must construe the rule in question according to what I think to be the meaning of the language used therein, and I find myself very much in the same position as Kay J. found himself in *Ex parte Mayor of London* (1), where the examination of title, which I agree was examination for the first time, was of a very minute character, and he said nevertheless that there was an investigation of title, although in his opinion he thought the solicitor who was charging the scale fee was being remunerated to an excessive extent. Kay J. said that was the fault of the Order made under the Act of Parliament, and that it was a matter for legislation and not for him. The truth is that this Order may work both ways, and the profession must take the rough with the smooth. This happens to be one of the smooth bits.

(1) 34 Ch. D. 452, 457.

The result is that I accede to the application made by the solicitors, and allow the objections, and refer the matter back to the Taxing Master to be dealt with.

Solicitors for applicants : *Coward, Chance & Co.*
Solicitors for respondents : *Godden, Holme & Ward.*

P. J. B.

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tum of ROMER, J., at p. 391, *cised.* MINISTRY OF HEALTH *v.* PSON. [1950] 2 All E.R. 1137.

In re MASON.

[1927. M. 67.]

Limitations, Statute of—Lunatic—Fund in Court—Master's Certificate, no Heir at Law or Next of Kin—Escheat—Bona vacantia—Ex gratia Grant—Indemnity—Mistake of Fact—Claim by alleged Next of Kin—Droits of the Crown—Limitation Act, 1623 (21 *Jac.* 1, *c.* 16).

A lunatic, at the date of her death in 1798, was entitled to certain funds in Court representing the residuary estate of her father. In 1794 the Master had reported that the lunatic had no heir at law or next of kin. In 1798 and 1801 the Crown made ex gratia grants of these funds to certain persons and obtained an indemnity in respect of these grants.

In 1926 a petition was presented by persons claiming to be the next of kin of the lunatic for the payment to them of the whole of her personal estate. The parties agreed to confine themselves, for the present, to seeking a determination of the following questions : (1.) Whether the petition was maintainable on the assumption that no part of the funds in question ever came into the hands of or was dealt with by his present Majesty or his nominees or grantees or was carried to the Consolidated Fund ; (2.) Whether the petition was barred by any Statute of Limitations ; (3.) Whether in view of s. 5 of the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), the suppliants could proceed without serving the petition upon the successors in title of the persons to whom the ex gratia grants had been made :—

Held, that the first question must be answered in favour of the suppliants.

Attorney-General v. *Köhler* (1861) 9 H. L. C. 654 discussed.

Held, however, that the second question must be answered in favour of the Crown, and that the petition was barred by the Limitation Act, 1623, and consequently failed.

In re Robinson [1911] 1 Ch. 502 considered.

Held, also, that s. 5 of the Petitions of Right Act, 1860, did not apply to the present case.

PETITION OF RIGHT.

The following statement of the facts is taken from his Lordship's considered judgment :—

Maria L'Epine died on April 30, 1798. At this date she

ROMER J. 1927 MASON, *In re.*

was entitled to certain funds in Court representing the residuary estate of her late father, but subject to the payment of two annuities. In the year 1791 she had been found to be a lunatic, and in the course of certain proceedings in Chancery instituted for the administration of her father's estate the Master had, in July, 1794, reported that she had no heir at law or next of kin. This report was in due course confirmed by the Court. In these circumstances the Earl and Countess Howe obtained letters of administration of the estate of Maria L'Epine for the use and benefit of His Majesty King George III., and thereupon petitioned the Court for payment out to themselves as such administrators of the funds in Court, after appropriating a sufficient part thereof to answer the two annuities. An order was made on this petition on July 22, 1799, directing certain securities of the nominal amount of 15,000*l.* to be appropriated to meet the two annuities and directing payment to Lord and Lady Howe of the balance of the funds in Court. It appears that Lord and Lady Howe had presented a memorial to the Lords Commissioners of the Treasury alleging that it had been the intention of Maria L'Epine's father to give them the beneficial interest in the property left to her by his will in the event of her death, and praying that the Commissioners would intercede with His Majesty to grant to them for their use and benefit the personal estate and effects of Maria L'Epine, subject to any claim or right of the next of kin of the said Maria L'Epine, if any should thereafter appear entitled in that capacity. Before any such grant was in fact made, Lord and Lady Howe both died, and their only two surviving children—namely, Sophia, Baroness Howe and Catherine, Marchioness of Sligo—were their legal personal representatives. These two daughters then presented a memorial to the Commissioners asking that, subject to the payment of 10 per cent. on the value thereof for His Majesty's use, they might be at liberty to appropriate the estate of Maria L'Epine to their own use in equal moieties. His Majesty's assent having been obtained to this proposal the two daughters appear to have paid over the 10 per cent. to His Majesty, and

thereupon, by Royal Warrant dated June 8, 1801, His Majesty granted to the two daughters, to be divided between them in equal moieties, the personal estate and effects of Maria L'Epine to which His Majesty in right of the Royal Prerogative had become entitled, including the 15,000*l.* which was still in Court. The habendum was in these terms: "To have, hold, take and enjoy the same unto the said Baroness Howe and the said Marchioness of Sligo, their executors, administrators and assigns in as full, ample and beneficial a manner as we ourselves are or could or might have been entitled to have, receive or enjoy the same, subject nevertheless to any claim or right of the next of kin of the said Maria L'Epine, if any should hereafter appear entitled in that capacity to the said personal estate and effects, and as an indemnity to us, our heirs and successors against any such eventual claim, security has been given by or on behalf of the said Baroness Howe and Marchioness of Sligo." The indemnity here referred to consisted of two bonds in penal sums for the purpose of securing repayment of the estate to His Majesty, his heirs and successors, if any person or persons whomsoever should at any time or times thereafter by due course of law prove himself or themselves to be the next of kin of Maria L'Epine and for the purpose of indemnifying His Majesty, his heirs and successors, against all claims and demands which should or might at any time or times thereafter be made upon him or them for or in respect of the personal estate and effects of the said Maria L'Epine by any person or persons whomsoever, and also all loss, costs, damages and expenses which His Majesty, his heirs and successors, might at any time thereafter pay or sustain by reason of His Majesty's having given and granted the personal estate and effects to the Baroness Howe and the Marchioness of Sligo.

The two annuitants having died in 1818 and 1830 respectively, the 15,000*l.* was duly paid out of Court to persons claiming under the two daughters of Lord and Lady Howe under orders dated July 1, 1820, and March 8, 1831, respectively.

ROMER J. 1927 MASON, *In re.*

On July 1, 1926, this petition of right was presented by persons alleging that it has recently been established that Maria L'Epine did in fact leave next of kin surviving her, and that they now represent such next of kin. They accordingly seek to recover from the Crown with interest the whole of the personal estate of Maria L'Epine, or alternatively the 10 per cent. of such estate that was paid over to the Crown by the two daughters of Lord and Lady Howe. I am not for the present concerned to inquire whether Maria L'Epine left any next of kin or whether the suppliants do or do not represent any such next of kin. For the parties have agreed to confine themselves, for the present, to seeking a determination of the following questions: (1.) Whether the petition is maintainable on the assumption that no part of the funds in question ever came into the hands of or was dealt with by his present Majesty or his nominees or grantees or was carried to the Consolidated Fund. (2.) Whether the petition is barred by any Statute of Limitations. (3.) Whether in view of s. 5 of the Petitions of Right Act, 1860, the suppliants can proceed, without serving the petition upon the successors in title of the Earl and Countess Howe and Sophia, Baroness Howe and Catherine, Marchioness of Sligo.

Topham K.C. and *A. C. Nesbitt* for the petitioners. As to question (1.), all the property received by the Crown was received by the Crown as a corporation sole in its corporate capacity. Obligations arising thereout can be enforced against the successors of the Crown by means of a petition of right. The authorities show that where an obligation was incurred by one King it can be enforced against his successor: see *Abbot and Convent of Wardon's Case.* (1) The position of the Crown as a royal person and as a corporation is discussed in the *Duchy of Lancaster Case.* (2) See also *Sir Thomas Wroth's Case* (3); *Ryves* v. *Duke of Wellington* (4); *Viscount Canterbury* v. *Attorney-General.* (5)

(1) Ryley's Pleadings in Parliament (1305) 262.
(2) (1562) 1 Plowd. 212.
(3) (1573) 2 Plowd. 452.
(4) (1846) 9 Beav. 579.
(5) (1843) 1 Ph. 306.

ROMER J.
1927
MASON, *In re.*

In *Attorney-General* v. *Köhler* (1) opinions were expressed contrary to the present contention, but these opinions were expressed as the result of a very short argument in the Court below. When property comes to the Crown as bona vacantia it comes as Crown property, and can be pursued against the King in his corporate capacity. In the present case the property was received by the Crown in its corporate capacity.

As to question (2.): this petition is not barred by any Statute of Limitations. Sect. 13 of the Law of Property Amendment Act, 1860 (which was referred to in the Crown's demurrer to the petition), only applies to protect an administrator. These proceedings are not being taken against an administrator but against a beneficiary: see *In re Johnson.* (2)

All the parties knew that the property was to be held by the two daughters of Lord and Lady Howe upon a constructive trust. Where a beneficiary receives money knowing it to be part of a trust fund it is excepted from the Statutes of Limitation: see *Brooksbank* v. *Smith.* (3) The money was taken with the knowledge that it belonged to the next of kin, if any next of kin could be found.

As to question (3.): the parties had been unable to trace any persons who could be served under s. 5 of the Petitions of Right Act, 1860.

Sir Douglas Hogg A.-G. and *Stafford Crossman* for the Crown. This action is wholly misconceived. The only claim would be against the administrator to compel him to repay the money or procure the repayment of it. It is true that the right to receive money on an intestacy is a right of the Crown. It is also true that the Crown never ceases to exist, but it is not true to say, as a consequence of that, that the obligations of the Sovereign for the time being ever fall on successive sovereigns. In *Attorney-General* v. *Köhler* (1) a strong view was expressed to the opposite effect. See also Robertson's Civil Proceedings against the Crown, p. 369,

(1) 9 H. L. C. 654. (2) (1885) 29 Ch. D. 964, 970.
(3) (1836) 2 Y. & C. Ex. 58.

ROMER J. 1927 MASON, *In re.*

and an essay on "The Crown as Corporation" in Professor Maitland's Collected Papers, vol. iii., p. 252.

As to question (2.): assuming that there is some cause of action (which is denied as against the Crown) it is a fallacy to assert that the Crown received the property as a constructive trustee. The Crown took, not with notice of a trust but with notice that if any persons had been in existence as next of kin there would have been a trust. The Crown took the property with knowledge that there were none, for it had been so found. The trust came to an end by virtue of the handing over of the fund to the Crown by the administrator. If the petition was accurate the money so paid was paid under a mistake of fact, and an action for money paid under a mistake of fact is barred in six years. This is an action of the same kind as *In re Robinson.* (1) See also *Baker* v. *Courage & Co.* (2); *Brooksbank* v. *Smith* (3); *In re Eyre-Williams.* (4)

If reliance is placed on question (3.) the persons concerned should have an opportunity of coming forward to deal with their rights. The essence of the case is that the property should be able to be traced. The Crown is entitled to succeed on the two first points and the petition should be dismissed.

Topham K.C. in reply. A person who receives money with notice of a trust cannot plead any Statute of Limitations: see *Wassell* v. *Leggatt.* (5) The Crown relied on their indemnity and did not take proper precautions.

Cur. adv. vult.

Dec. 21. ROMER J. [after stating the facts as above set out, continued:] Inasmuch as it is obvious that if either of the first two of these questions is answered adversely to the suppliants the petition must be dismissed, the course suggested appeared to me to be a convenient one. The three questions were accordingly argued before me and I must now give my decision upon them. It will, however, I think, be convenient to consider, in the first place, the

(1) [1911] 1 Ch. 502.
(2) [1910] 1 K. B. 56.
(3) 2 Y. & C. Ex. 58.
(4) [1923] 2 Ch. 533.
(5) [1896] 1 Ch. 554.

question of the Statutes of Limitation. In the Crown's demurrer to the petition the statutes specifically referred to are s. 3 of the Intestates' Estates Act, 1884, s. 30 of the Administration of Estates Act, 1925, and s. 13 of the Law of Property Amendment Act, 1860. But at the Bar the only statute relied on by the Crown was 21 Jac. 1, c. 16. In order to see whether this statute affords an answer to the claim of the suppliants, it becomes necessary to ascertain what is the real nature of that claim. So far as regards that portion of Maria L'Epine's estate which was granted by George III. to the daughters of Lord and Lady Howe it is difficult to see on what ground the Crown can in any case be made liable to restore it to Maria L'Epine's next of kin unless the Crown was under some fiduciary obligation to the next of kin to obtain possession of it on their behalf, and it was not contended before me that any such obligation existed. The most that can be said against the Crown, as it seems to me, is that in the circumstances that portion of the estate must be deemed to have been received by His Majesty King George III. from the administrators of Maria L'Epine and paid over by him to the two daughters. I doubt very much whether this is the proper conclusion to be drawn from the facts; but for the present purpose I will assume that His Majesty received not only the 10 per cent. which admittedly came into his hands, but the rest of Maria L'Epine's estate as well. On that assumption the claim of the suppliants is one to recover from the Crown moneys that in fact belonged to Maria L'Epine's next of kin, but was wrongfully paid over by her administrators to King George III. It is, in other words, a claim by a cestui que trust to recover from a third party money which his trustee has by mistake paid to that third party. Such a claim is one for money had and received. Now it was pointed out by Warrington J. in *In re Robinson* (1), to which I must refer presently, that it may be a matter of some doubt whether, in strictness, the cestui que trust in such a case could maintain an action against the third party for money had and

(1) [1911] 1 Ch. 502.

ROMER J. 1927 MASON, *In re.*

received, though he could at all events maintain a suit in equity for it, making the trustee a party. But in such a suit the cestui que trust would have no better right than the trustee would have in an action brought by himself, and if the claim of the trustee would be barred in an action at law by any Statute of Limitations, the claim of the cestui que trust, so far as it was one for money had and received, would be equally barred. What, then, is the Statute of Limitations applicable to an action for money had and received? Inasmuch as such an action is an action upon the case, the statute applicable is that of 21 Jac. 1, c. 16, and the action is barred after six years from the time when the cause of action arose. It was, however, urged before me, on behalf of the suppliants, that, though an action to recover money paid under a mistake of fact may come within the category of actions on the case, nevertheless time does not begin to run under the statute until discovery of the mistake, and *Brooksbank* v. *Smith* (1) was cited as an authority for this proposition. But that was not an action to recover money paid under a mistake. It was, as pointed out in *Baker* v. *Courage & Co.* (2), a case in which the plaintiff was seeking purely equitable relief. A trustee had by mistake paid over certain stock to the defendant, who was not entitled to it, and, upon discovering his mistake, the trustee filed a bill to have re-transferred to him so much of the stock as was still retained by the defendant. The trustee was, therefore, claiming to follow specific trust property. To such a claim no Statute of Limitations was applicable, and Alderson B., when asked to apply the statute of James I. by analogy, declined to do so, inasmuch as six years had not elapsed since the plaintiff had the opportunity of discovering the mistake. In *Baker* v. *Courage & Co.* (2) there was a counterclaim by the defendant to be repaid money paid by him to the plaintiff under a mistake of fact. The plaintiff relied upon the statute of James I. and the defendant contended that time did not run under the statute until discovery of the mistake. In rejecting this contention Hamilton J.

(1) 2 Y. & C. Ex. 58. (2) [1910] 1 K. B. 56 62.

distinguished *Brooksbank* v. *Smith* (1) on the grounds mentioned above and added this: "Therefore it was a case to which the Statute of Limitations did not apply; and the rule which was there laid down was one which in my opinion cannot be transferred to cases like the present, to which the statute does directly apply. In dealing with the latter class of cases, Courts of Equity were just as much bound by the statute as were Courts of common law." He further held that the cause of action was complete as soon as the money was paid. In this connection I ought perhaps to refer to the statement made by Parker J. in *Lodge* v. *National Union Investment Co.* (2), that an action for money had and received is an equitable action. He did not, however, say, nor did he intend to say, that a plaintiff claiming money had and received was claiming equitable relief. This is quite clear from the fact that he used the word "action" and that he referred to *Moses* v. *Macferlan* (3) as an authority for his statement. In that case Lord Mansfield said: "If the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract ('quasi ex contractu,' as the Roman Law expresses it)," and he referred to an action for money had and received to the plaintiff's use as a species of assumpsit. Later on he added: "This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which ex aequo et bono, the defendant ought to refund." An action for money paid under mistake is therefore an action at common law, though it is one founded upon an equity. But though it may therefore properly be called an equitable action it is nevertheless an action to which the statute of James I. directly applies, and is not one to which the statute is only applicable by analogy. I am therefore of opinion that the suppliants' claim is barred by the statute so far as it is to be regarded as a claim at common

(1) 2 Y. & C. Ex. 58. (2) [1907] 1 Ch. 300, 305.
(3) (1760) 2 Burr. 1005, 1008, 1012.

ROMER J. 1927 MASON, *In re.*

law for money had and received. There are, however, cases in which a cestui que trust who finds that his money has been paid away by his trustee to a third party, who has applied it to his own use, can recover it in equity after any length of time if he has not lost his right by his own laches. These cases are three in number, as pointed out by Warrington J. in *In re Robinson.* (1) He said: "I think cases of this kind where mistakes have been made by trustees in payment of trust funds fall under three heads. Where the Court is administering the funds and adjusting the rights of the parties between themselves in the ordinary course, if there are funds belonging to the person who has been overpaid, the Court may so adjust the rights as to rectify the overpayment." To that class belonged the case of *Harris* v. *Harris* (*No.* 2) (2), when properly understood, as was pointed out by Warrington J. The learned judge then proceeded as follows: "Then, again, there are cases where trust money actually remaining in the hands of the person in whose hands it has been wrongly placed may be followed. In such a case there is no difficulty at all; a person has received a trust fund, and it is still in his hands, and still impressed with a trust, and of course he holds it as trustee and is bound to transfer it." *Brooksbank* v. *Smith* (3) was a case of that class. "The third class of cases is where the trust funds or the proceeds of the trust funds have been received by a person with knowledge that they are wrongly paid to him." Of this last class of case *In re Eyre-Williams* (4) is an instance. In such cases the recipient is a constructive trustee and comes within the class of persons mentioned by Bowen L.J. in *Soar* v. *Ashwell* (5), who have received trust property and dealt with it in a manner inconsistent with trusts of which they were cognizant.

Now the present case does not, of course, come within the first of the three classes mentioned by Warrington J. Having regard to the assumption that I am required to make,

(1) [1911] 1 Ch. 502, 513.
(2) (1861) 29 Beav. 110.
(3) 2 Y. & C. Ex. 58.
(4) [1923] 2 Ch. 533.
(5) [1893] 2 Q. B. 390.

I must take it that no part of the estate of Maria L'Epine is in the hands of his present Majesty or forms part of the Consolidated Fund. The case does not therefore fall within the second class. Does it fall within the third? The suppliants contend that it does, inasmuch as His Majesty King George III. took steps to procure an indemnity from his grantees against the claims of any next of kin of Maria L'Epine. The suppliants ask me to infer from this that the Crown suspected that there were such next of kin in fact. But the Master in Chancery had certified in 1794 that there were no next of kin, and the Court had confirmed his report. It seems quite clear that the Crown must have thought that there were no next of kin in fact, and I cannot regard the taking of the indemnity as affording any indication that the Crown knew that the estate was being wrongly paid over, or that it was being dealt with in a manner inconsistent with trusts of which the Crown was cognizant. The taking of this indemnity was an ordinary measure of precaution, and one which I suspect would always be taken by the Crown when making an ex gratia grant out of funds claimed as bona vacantia. When a trustee distributes a trust fund he very often asks for and receives a release and indemnity. It cannot be inferred from his doing so that he knows or even suspects that he is paying the wrong persons. In my judgment the claim of the suppliants is barred by the statute of James I. This is sufficient to dispose of the petition, but as the other two points of defence were fully argued before me, and as this case will probably go farther, I think that I ought to express shortly the conclusions at which I have arrived upon them.

In support of his contention that upon the assumption referred to in the first question submitted to me the petition is not maintainable, the Attorney-General relied upon the case of *Attorney-General* v. *Köhler*. (1) In that case one Mitford had in 1813 obtained as nominee of the Crown, and for the use and benefit of his then Majesty, a grant of letters of administration to the estate of one Köhler, who had died

(1) 9 H. L. C. 54.

ROMER J. 1927 MASON, *In re.*

intestate, and, as it was then thought, without next of kin. Mitford administered the estate, and in 1814 paid over the surplus of the estate to the Prince Regent on behalf of King George III. In the year 1820 a bill was filed against Mitford by persons claiming to be entitled as Köhler's next of kin for the purpose of receiving such surplus. In 1824 Mitford died and in 1827 one Maule obtained letters of administration de bonis non to Köhler's estate. Thereupon the suit was revived against Maule, who died in 1851. Both Mitford and Maule had been in succession Solicitors to the Treasury, and on the death of the latter one Reynolds was appointed to that office. By the statute 15 Vict. c. 3 it had been enacted that all proceedings in law or equity against Maule as administrator as the nominee of the Crown pending at the time of his decease should not thereby abate, but should continue and take effect against the Solicitor for the time being of the Treasury. In the year 1859 the title of the next of kin was established. It was in these circumstances that in 1860 an order was made on Reynolds to pay into Court the amount paid over to the King's Proctor in respect of Köhler's surplus estate, together with a large sum for interest. From this order an appeal was brought before the House of Lords in the year 1861. On the hearing of the appeal it was contended that in any case Reynolds could not be made liable in respect of the money paid over by Mitford. But it was also argued on behalf of the appellants, and apparently for the first time, that Mitford was merely the nominee of the Crown, that if any one was liable it was the Crown and not Mitford, but that Her Majesty, Queen Victoria, was not bound to afford compensation for an erroneous payment made by Mitford to King George III. In answer to this latter contention the respondents' counsel objected that, inasmuch as this point had not been raised in the Court below, where the only point argued, apart from the proof of the title of the respondents, was whether interest was payable, it was not open to the appellants in the House of Lords. The question, therefore, whether Queen Victoria could be asked to make compensation for money which was paid over wrongfully

to George III. and never came into her hands was not argued by them. They contented themselves by contending for the personal responsibility of Mitford as administrator, and for the devolution of that responsibility upon Reynolds. It is necessary to state the facts and the arguments thus fully in order to understand the speeches of the noble Lords who took part in the decision. Lord Cranworth said this (1): "If this case is to be dealt with on the ordinary principles of equity as administered between subject and subject, I have great difficulty in understanding how either the Crown or the appellant Reynolds can be held to be liable in respect of the demand of the respondents." He then stated the facts and proceeded as follows: "The personal estate of an intestate who leaves no next of kin belongs absolutely to the Sovereign for the time being, as part of the droits of the Crown. Assuming therefore, the facts to have been such as they were supposed to be in 1814, the money was properly paid over to the Prince Regent, as representing for that purpose King George III. Subsequent investigation has shown that the payment was made in ignorance of the true state of facts. It was a mistake to suppose that the General had left no next of kin. He left nephews and nieces who were his next of kin, and in that character were entitled to the money. If the true state of things had been ascertained in the lifetime of King George III., the obvious justice of the case would have required that he, or the Prince Regent acting for him, should refund the money which had been paid to him on a mistaken view of the facts. But the truth was not discovered in the lifetime of George III., or of either of his sons, George IV. or William IV. It was not finally established till the year 1859, i.e., nearly forty years after the death of King George III.; nearly thirty years after the death of King George IV., and considerably more than forty years after Mitford had parted with the money. Who in these circumstances ought to be held responsible to the next of kin for the money which thus improperly came to the hands of the Prince Regent, acting for his father King

(1) 9 H. L. C. 670.

ROMER J. 1927 MASON, *In re.*

George III. ? It is very difficult to say on what ground Her Majesty, or Her Majesty's Treasury, can be considered as under any obligation to refund, or rather pay, the money. It never came to Her Majesty's hands. The Crown is a corporation sole, and has perpetual continuance. Can a succeeding Sovereign, upon the principle that the King never dies, be held responsible for money paid over in error to and spent by a predecessor, which that predecessor might lawfully have disposed of for his own use, supposing it to have rightfully come to his hands ? Does the successor for such a purpose represent his predecessor ? These are questions difficult of solution. Let me put a case between subjects nearly analogous to the present, in which the Sovereign is concerned. Suppose a bishop, lord of a manor ; and that on the death of the copyholder he claims a heriot, alleging such to be the custom of his manor, and suppose that the heir of the copyholder, relying on the assurance of the bishop that the heriot was due by the custom of the manor, accordingly pays to the bishop a sum of money by way of composition for the heriot ; the bishop dies, and then it is discovered that no heriot was payable to the bishop in respect of the copyhold held of him, but that it was in fact payable to the lord of an adjoining manor, who, thereupon recovered it against the copyhold heir. It could not be pretended that the copyholder would have any right against the bishop's successor. His right would be against the executor of the bishop, to whom the payment had been made, on an erroneous allegation by him, that there was a custom in his manor entitling him to it. On the same principle, reasoning by analogy from the case as it would have stood between subject and subject, the right of the present respondents would be a right against the executors of either King George III. or King George IV., it is immaterial to consider which, certainly not against Queen Victoria. Nor is the case altered by the arrangements made on the accession of Her Majesty with reference to the civil list. On that occasion Her Majesty in consideration of a certain annual income secured to her by Parliament, gave up to the public, as King William IV. had previously

done, inter alia all droits of the Crown accruing during her reign, which therefore, when received, are now received by the Treasury, not on the private account of Her Majesty, but on account of the public. This arrangement, though it secures to the public droits of the Crown accruing after the accession of Her Majesty, obviously has no bearing on the question who is liable in respect of droits which came to the hands of a preceding Sovereign. If an heir in tail, on succeeding to his lands, were to convey them for his life to a stranger, in consideration of an annuity secured to him for his life, it would be absurd to say that such a settlement could create in the heir in tail, or the person claiming from him, any liability to discharge the debts of the preceding tenant in tail. On no analogy taken from disputes among subjects, can either the present Queen or the Treasury be deemed liable to the respondents for the personal estate of the intestate received by King George III. It is not, however, necessary to decide whether in a direct proceeding against the Sovereign (by petition of right, for instance), these analogies would govern the decision to be pronounced. The party here made responsible is not the Crown but Mr. Reynolds, and the true question is, whether he, as personal representative of the intestate, on the nomination of the Crown, can be held liable." Lord Cranworth then considered whether Reynolds could be made responsible for what Mitford had done, and holding that the principles that would have prevailed in the case of ordinary administrators were applicable notwithstanding the fact that the grant of administration had been made to a nominee of the Crown for the use and benefit of His Majesty he decided that Reynolds could not be made liable for principal or interest, or rather, that he would not have been liable had not his liability for the principal been admitted in the Court below. Lord Wensleydale, so far as the present point is concerned, contented himself by saying that the remedy of the next of kin against the Crown was " a very doubtful one to say the least." Lord Chelmsford expressed himself more positively. He said (1) : " There can be no doubt that

(1) 9 H. L. C. 687.

ROMER J. 1927 MASON, *In re.*

Mitford, by taking out administration and possessing himself of the personal estate of the intestate, became personally responsible to those who were entitled to this estate, that is, to the next of kin of the intestate. And if, after Mitford had paid over the money to the Treasury for the use of His Majesty, any persons had appeared and established their claim as next of kin, he would have been liable to repay the money to them, because he would not have properly administered the estate. Upon his death this liability would have been continued against his representatives. But as the money had, strictly speaking, been paid to the use of George III., although George IV. had probably received it as Regent, he would not have been liable to refund it as King." "He" in this last sentence refers, as I understand it, to King George IV. Lord Chelmsford then continued: "If nothing more had been done, therefore, after the accession of King George IV., the only remedy which the claimants could have had would have been against the estate of Mitford," and a little later he says: "The difficulty of the case, however, is not so apparent during the reign of George IV. as after the accession of King William IV. and of her present Majesty. If the claim could be maintained only against the Sovereign, it would be most unreasonable that his successors should be required to pay what never came to their hands." In the end, however, he stated that he did not treat this case as being a proceeding against the Crown, but as a suit against successive administrators.

In these circumstances I cannot, unfortunately for myself, treat the case as a conclusive authority in favour of the contention of the Attorney-General, in the case before me, and I must form my own conclusions upon the point. The opinions of such high authorities as Lord Cranworth, Lord Wensleydale, and Lord Chelmsford must naturally be received with the greatest respect. I may, however, be pardoned if I venture to criticize their opinions, seeing that the point was never argued on the part of the respondents, and that the argument on the part of the appellants, so far as this point is concerned, does not appear to have been supported

by the citation of any reported case or other authority. It must, I think, be taken as established law that the Crown is a corporation, whether it be a corporation sole, as it is generally thought to be, or whether, as Professor Maitland supposed, it be a complex and highly organized corporation aggregate of which the King is the head: see vol. iii. of his Collected Papers, p. 259. If Professor Maitland's view be the true one, then the estate of Maria L'Epine was received by a corporation aggregate, and the reasoning of Lord Cranworth, based upon the analogy of certain corporations sole, would not apply. The corporation aggregate that received the money would be the same corporation aggregate that is now asked to refund it, and the fact that such corporation is now under a different headship would not appear to be material. But, assuming the Crown to be a corporation sole, why should not the same result follow? The estate was received in the time of King George III. by the corporation sole, and the same corporation sole is now asked to refund it. Lord Chelmsford thought that where there had been a change in the person of the sole corporator such a demand was "most unreasonable." It does, no doubt, seem somewhat unreasonable that in the year 1861, the Crown, in the person of Queen Victoria, should have been asked to refund money that was paid to King George IV. when he was Prince Regent. Anything that is unreasonable in such a stale demand could, I should have thought, be safely left to the Statute of Limitations to deal with. But Lord Chelmsford did not seem to be dealing merely with a stale demand, and, if he be right, then, although money should have been wrongfully paid, in right of the Crown, to King William IV. in 1836, it would be "unreasonable" for the true owner to petition the Crown in the person of Queen Victoria for repayment in 1838. Surely if the matter is to be decided from the point of view of reasonableness it would be most unreasonable in such a case to refuse the true owner relief; for he would then be without any remedy at all (as to this, see *Ryves* v. *Duke of Wellington*. (1)) Lord Cranworth,

(1) 9 Beav. 579.

ROMER J. 1927 MASON, *In re.*

indeed, seemed to think that in the case before him the next of kin would have had some right against the executors of George III. or George IV. But *Ryves* v. *Duke of Wellington* (1) was not cited to him; and even if there could have been any such executors, they would have had nothing to do with moneys that had come to their testator in right of the Crown, for over such moneys the Sovereign had not been given any testamentary powers by the statute 40 Geo. 3, c. 88. The truth is that Lord Cranworth's opinion throughout was based upon the analogy of other corporations sole, and if I may be permitted to say so, it was a false analogy. He supposed the case of a bishop lord of the manor receiving a sum of money from a tenant by way of composition for a heriot, that could not lawfully be claimed, and pointed out that it could not be pretended that the tenant could claim repayment of the money from the bishop's successor. But neither a heriot received by a bishop nor the money paid in composition for it would pass to the bishop's successor, so far as not disposed of in his lifetime. They would pass to his legal personal representatives: *Rennell* v. *Bishop of Lincoln.* (2) In this respect the Crown differs from most other corporations sole: see Grant on Corporations, p. 629, and the cases there cited. It differs, too, in many other respects. In the case of other corporations sole the sole corporator for the time being has two capacities, his personal and his corporate capacity. If land be conveyed to him and his heirs, in the former capacity the fee simple belongs to him, and not his successor. It is otherwise in the case of the King. He has, from the point of view of property at any rate, but one capacity, or, to use the language of the judges in the *Duchy of Lancaster Case* (3), "to this natural body is conjoined his body politic, which contains his royal estate and dignity, and the body politic includes the body natural, but the body natural is the lesser, and with this the body politic is consolidated. So that he has a body natural, adorned and invested with the estate and dignity royal, and

(1) 9 Beav. 579. (2) (1827) 7 B. & C. 113, 166.
(3) 1 Plowd. 212, 213.

he has not a body natural distinct and divided by itself from the office and dignity royal, but a body natural and a body politic together indivisible, and these two bodies are incorporated in one person, and make one body and not divers, that is the body corporate in the body natural, et e contra the body natural in the body corporate." But these observations do not apply to any other corporation sole with which I am acquainted. They certainly do not apply to Lord Cranworth's bishop. The bishop by his will could have disposed of the heriot or the money. The Sovereign, in a like case, could not. Even his testamentary power over property coming to him otherwise than in right of his Crown had to be conferred on him by Act of Parliament, and, but for this statutory power, everything of which the Sovereign should die possessed would pass to his successor. If the analogy of Lord Cranworth's bishop is to prevail, then the King's successor corresponds, not to the successor of the bishop, but to the bishop's legal personal representatives. And, subject to the Statute of Limitations, they would certainly have been liable to refund out of the bishop's estate the moneys received by him, even if the moneys had been spent by the bishop in his lifetime.

For these reasons, and with the utmost respect, I am unable to bring myself to agree with the opinions expressed by Lord Cranworth and Lord Chelmsford. In my judgment the first question submitted to me for decision must be answered in favour of the suppliants.

The only question remaining to be disposed of is that arising under s. 5 of the Petitions of Right Act, 1860. The section refers to petitions of right presented for the recovery of any real or personal property, or any right in or to the same, which shall have been granted away or disposed of by or on behalf of His Majesty or his predecessors, and directs that a copy of the petition shall be served as therein mentioned upon the person in the possession, occupation, or enjoyment of such property or right. The section prima facie would appear to relate to a claim to recover any special property wrongfully granted or disposed of by the Crown in favour

ROMER J. 1927 MASON, *In re.*

of some third party. But in such a case why should the Crown be brought into the matter at all? If the Crown in making the grant or disposition could be treated as having committed some breach of trust, a claim might conceivably be preferred against it for the damages thereby caused to the suppliant. But the petition of right would not, in that case, be presented for recovery of the property, but for compensation, and the section would not apply, or, apart from any question of a breach of trust, the Crown might have effected a tortious conversion of the property; but in that case no petition of right would lie at all. I therefore find it somewhat difficult to understand what kind of claim against the Crown is contemplated by the section. There is presumably some sort of claim to which it would apply, though I have been unable to think of one. It does not, at any rate, apply to the present case. This is not a claim to recover any property granted away or disposed of by the Crown; it is a claim to render the Crown liable for money alleged to have been had and received by the Crown to the use of the suppliants. I have already referred to the difficulty of treating the Crown as having received any more than the 10 per cent. But assuming in the suppliants' favour that the Crown is to be treated as having received the balance, as having then paid it over to the daughters of Lord and Lady Howe, the suppliants are not attempting to recover the estate in specie, or to make the Crown liable for having wrongfully paid it over, but as having, by reason of this receipt alone, come under an equitable obligation—enforceable, if the Crown had been an ordinary person, by an action on the case at law—to pay an equivalent sum to the suppliants.

In my opinion, the section has no application to the case.

Solicitors: *Markby, Stewart & Wadesons; the Treasury Solicitor.*

J. L. D.

In re DUCKER'S TRADE MARK.

TOMLIN J.
1928
Feb. 8, 9.

[1927. D. 1357.]

Trade Mark—Registration—Non-user—Bona fide Intention to use—Contingent Intention—Intention to use through a limited Company—Removal of Mark—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *s.* 37.

The bona fide intention to use a trade-mark in connexion with the goods for which it is registered, as required by s. 37 of the Trade Marks Act, 1905, means a definite and present intention on the part of the proprietor so to use it.

The section is not satisfied by a precautionary registration with a contingent intention of using the mark if occasion requires.

Nor is the section satisfied by an intention to assign the mark to a limited company for the purpose of such user.

In re Batt's Trade Marks [1898] 2 Ch. 432, 439, 440 applied.

ORIGINATING MOTION WITH WITNESSES.

On March 25, 1924, Mrs. Ducker registered the invented word "Notox" in class 48 in respect of "dyes for the hair."

The mark was registered in the following circumstances: For some years before March 25, 1924, Mrs. Ducker and her husband Noel and his brother Philip had been interested in various hair-dye companies as directors or shareholders, and at the date of registration Mrs. Ducker, though no longer a director, was manager of the laboratories of company A, in which dyes were mixed and preliminary experiments conducted, before the dyes were tried on the customers. Mrs. Ducker was engaged in perfecting on her own account a secret process for a new hair-dye for which the name "Notox" had been evolved and discussed between Noel and Philip. There was conflicting evidence as to whether the word was first invented by the Duckers or by the applicants, an American hair-dye company, but the Court held that the Duckers invented the word, and that the applicants heard of it through Philip, on the occasion of his assigning his own interest in the applicants' business to the applicants.

TOMLIN J.
1928
DUCKER'S TRADE MARK, *In re.*

In 1922 criminal proceedings were commenced against Noel and Philip on a charge of conspiring to defraud the Inland Revenue. Philip escaped to France. Noel stood his trial and was acquitted on March 19, 1924; but shortly before this, on her husband's advice, Mrs. Ducker had applied to register the trade-mark so as to have something to start business with if anything happened to her husband and she were thrown on her own resources.

The mark was registered on March 25, 1924, but as Noel had been acquitted there was no immediate necessity for Mrs. Ducker to start a business on her own account, and she did not trouble herself about the mark for some three years.

At the date of registration the new dye was in fact being experimentally used by another company B in which the Duckers were interested in order to see whether it had all the necessary qualities, but the name "Notox" was not used, nor had Mrs. Ducker any business of her own. She never in fact intended to start a business in her own name and use the mark herself. She intended, if occasion arose, to assign the mark and secret process when perfect to a limited company to be formed for the purpose of using it, so as to avoid the risk of carrying on a hair-dye business in her own name.

On September 26, 1924, the applicants, who on August 26, 1924, had registered "Notox" in the United States, applied for registration in England, but found they were blocked by Mrs. Ducker's mark. They did nothing further, but waited to see if the mark were used.

On May 9, 1927, Mrs. Ducker, who and whose husband knew nothing about this application, formed a private limited company called Notox, Ld., to use the mark and secret process. The capital was 100*l.* in 100 shares and the directors were Noel and Smith.

On July 4, 1927, Mrs. Ducker assigned the secret process and the trade-mark to the company with the right to manufacture and sell the hair-dye and to use the name "Notox" in consideration of ninety-eight fully paid shares.

On July 18, 1927, the applicants applied under s. 37 of the Trade Marks Act, 1905 (1), to remove the mark on the ground that it was registered by Mrs. Ducker without any bona fide intention to use it in connexion with hair-dyes, and that there had in fact been no bona fide user in connexion therewith. They also contended that the assignment was bad under s. 22, as no goodwill then existed, and that the attempted assignment amounted to abandonment. As, however, the case was decided on the first point alone the arguments on the latter points are omitted.

The motion was originally launched against Mrs. Ducker alone, but the company, Notox, Ld., were added at the trial.

Hon. Stafford Cripps K.C. and *Lionel Heald* for the applicants. At the time of registration Mrs. Ducker had no "definite and present intention" to deal in hair-dyes or to use the mark in connexion therewith, but only a general intention of doing so at some future time if she thought it desirable, e.g., if she were thrown on her own resources. The registration was therefore improper: *In re Batt's Trade Marks* (2), following *Edwards* v. *Dennis.* (3) Those were decisions under the 1883 and 1875 Acts, but the same reasoning is still applicable: *In re Neuchatel Asphalte Company's Trade Mark.* (4)

There was therefore no bona fide intention to use the mark

(1) Sect. 37: "A registered trade-mark may, on the application to the Court of any person aggrieved, be taken off the register in respect of any of the goods for which it is registered, on the ground that it was registered by the proprietor or a predecessor in title without any bona fide intention to use the same in connexion with such goods, and there has in fact been no bona fide user of the same in connexion therewith, or on the ground that there has been no bona fide user of such trade-mark in connexion with such goods during the five years immediately preceding the application, unless in either case such non-user is shown to be due to special circumstances in the trade, and not to any intention not to use or to abandon such trade-mark in respect of such goods."

(2) [1898] 2 Ch. 432, 439, 440; affirmed [1899] A. C. 428.

(3) (1885) 30 Ch. D. 454, 465, 474, 476, 477, 479.

(4) [1913] 2 Ch. 291, 301.

TOMLIN J. 1928

DUCKER'S TRADE MARK, *In re.*

at the time of registration, and the non-user since that date is admitted.

Again Mrs. Ducker never intended to deal in hair-dyes or use the mark herself, but merely to form a company in that behalf if so minded. That is clearly not a bona fide intention to use within s. 37.

Rudolph Moritz K.C. and *F. E. Bray* for Mrs. Ducker and Notox, Ld. Sect. 37 is a new enactment in respect of which the authorities on former Acts have no bearing. The old Registration Acts assumed that some dealing in goods was going on. The present Act, s. 3, defines a trade-mark as a mark used or "proposed to be used" in connexion with goods to indicate that they are the goods of the proprietor. "Notox" was clearly a mark proposed to be used for the proprietor's goods when she commenced business and the mark was properly put on the register. In the *Neuchatel* case (1) the applicants had precluded themselves from using the mark in England for fifteen years.

Sect. 37 does not postulate an intention to use the mark immediately. Mrs. Ducker bona fide intended to use it if she were thrown on her own resources. A contingent intention is quite sufficient.

[TOMLIN J. In this case that contingency did not arise.]

That is so, and she had time to perfect her hair-dye. She could have taken her full five years' grace for non-user in order to do this. In fact she has only taken three. The applicants have to prove (1.) No bona fide intention to use, and (2.) non-user up to the date of their application. The second fact is admitted, but they have failed to prove the first.

The technical objection that Mrs. Ducker always intended to deal in hair-dyes and use the mark through a limited company, especially a private one-man company in which she holds practically all the shares, is really no answer to the question of bona fide intention. Her bona fide intention to use the mark through her company was a sufficient bona fide intention to use it within s. 37. The Court should not remove a mark on a mere technicality: *In re Magneta Time*

(1) [1913] 2 Ch. 291, 301.

Co.'s Trade Mark (1); and the applicants' three years' delay in making their application should also be considered.

Hon. Stafford Cripps K.C. in reply referred to Kerly on Trade Marks, 6th ed., p. 338, and *Muratti* v. *Murad.* (2)

TOMLIN J. [after stating the facts and observing that the applicants' three years' delay in making their application was no bar to their legal right under s. 37, continued:] Now I have to make up my mind whether having regard to the language of the Act, and the circumstances, and the actual non-user of this hair-dye, the mark was registered by the proprietor without any bona fide intention to use the same in connexion therewith within s. 37.

I am quite satisfied that at the time of registration Mrs. Ducker had no intention of using the mark herself, and that neither she nor her husband Noel would ever have dreamed of going into business for the purpose of marketing hair-dyes in their own names or otherwise than through the hand of a limited company.

Further, I think that Mrs. Ducker registered the mark at that time really as a sort of precaution, in order that she might have something that might be of some service to her if difficult times came. Happily for her, they did not come, and I really think she did not trouble about the mark for some three years.

Although no doubt there was an intention of some sort to use the mark; that is to say, that the mark was thought to be something which some day might be useful, I do not think that there was, at the time of registration, any definite and present intention to use it within *In re Batt's Trade Marks* (3) the language in which is as appropriate to-day as when that case was decided.

Moreover on the construction of s. 37 the intention to use means an intention to use by the person who registers. It is not open to a man to register a mark and say: "I do not intend to use this mark myself, but I intend at some later

(1) (1927) 44 R. P. C. 169, 173; [1927] L. R. Dig. 335.
(2) (1911) 28 R. P. C. 497, 511.
(3) [1898] 2 Ch. 432, 439, 440.

TOMLIN J. 1928 DUCKER'S TRADE MARK, *In re.*

stage or shortly to form a company, and transfer the mark to them with a view to their using it." That is not the bona fide intention to use, or user, by the applicant for registration which s. 37 requires.

That really disposes of the case and involves the removal of the mark on the ground of the absence of a bona fide intention to use and the admitted absence of user.

It is therefore unnecessary to consider various questions arising on the effect of an assignment under s. 22. For instance, can a mark registered with a bona fide intention to use it (e.g., to create a business and use the mark in connexion with the goods thereof) be transferred before any goodwill is created? Suppose the proprietor changes his mind and ceases to desire to carry on the business before any goodwill is created, can he transfer the mark? Or suppose a proprietor who has properly registered the mark for an intended business dies before it is started, must his executors commence the business and create a goodwill before they can transfer the mark? These questions happily I need not determine.

The order will be that the Court, being of opinion that the mark was registered by the proprietor without any bona fide intention to use the same in connexion with the goods in respect of which it was registered, and that there has in fact been no bona fide user of the same, doth order the rectification of the register by removal of the mark.

Solicitors: *Drake, Son & Parton*; *Macdonald & Stacey.*

G. R. A.

ROYAL LONDON MUTUAL INSURANCE SOCIETY, LIMITED *v.* BARRETT.

TOMLIN J.
1928
March 7.

[1927. R. 2157.]

Insurance—Life—Policy—Suicide, Condition against—Exception of bona fide Interests in third Parties—Mortgage—Assignment of Policy to Assurance Company.

An assurance company issued a policy containing the following condition: "5. Suicides, etc. The policy shall be void if the life assured dies by suicide or by the hands of justice. In any such case the directors may allow to the policy-holder such part of the sum assured as they shall think fit, and the policy shall remain in force to the extent of the pecuniary interest of third parties bona fide acquired for valuable consideration (satisfactory proof of which will be required) provided notice thereof in writing shall have been received and admitted by the directors at least one month prior to the date of death."

The company advanced money to the assured on a mortgage of certain leasehold property and on an assignment to them of the policy by way of security. It was provided by a clause in the mortgage deed that the company should satisfy themselves primarily out of the policy moneys. The assured committed suicide, and the company commenced an action against his executrix for the purpose of enforcing their security:—

Held, that, upon the true construction of clause 5, the expression "third parties" did not include the assurer; that the company was, therefore, entitled to proceed to enforce the security against the leasehold property; and that the policy was void.

White v. *British Empire Mutual Life Assurance Co.* (1868) L. R. 7 Eq. 394 distinguished.

ACTION.

By an indenture of mortgage dated February 1, 1927, Albert Stanley Davies demised to the plaintiffs a leasehold house and assigned to them a policy of assurance on his life, which had been effected by him with the plaintiffs, as security for a loan to him by the plaintiffs of 850*l.*, repayable with interest at 6 per cent. per annum. By clause 7 of the mortgage deed it was provided that the company should satisfy themselves primarily out of the policy moneys. By the policy the plaintiffs agreed to pay the sum of 900*l.* to Albert Stanley Davies or his personal representatives or permitted assigns. He committed suicide on July 9, 1927.

TOMLIN J.
1928
ROYAL LONDON MUTUAL INSURANCE SOCIETY v. BARRETT.

Condition 5 of the conditions of the policy provided as follows: "5.—Suicides, etc. The policy shall be void if the life assured dies by suicide or by the hands of justice. In any such case the directors may allow to the policy-holder such part of the sum assured as they shall think fit, and the policy shall remain in force to the extent of the pecuniary interest of third parties bona fide acquired for valuable consideration (satisfactory proof of which will be required) provided notice thereof in writing shall have been received and admitted by the directors at least one month prior to the date of death."

An action was commenced by the plaintiffs against the executrix of Albert Stanley Davies for the purpose of enforcing their security. The defendant, by her counterclaim, claimed payment of the difference between the said sum of 900*l.* and the amount due to the plaintiffs under the mortgage.

Gavin Simonds K.C. and *E. E. H. Brydges* for the plaintiffs. The question is whether the policy became void under clause 5 or the provision contained in that clause comes into operation. The defence has been based on the authority of and on a misapprehension of *White* v. *British Empire Mutual Life Assurance Co.* (1) The clause in that case is different, and that case is no authority for the construction of the clause in the present case. Untrammelled by authority the clause means that the only pecuniary interests preserved are the pecuniary interests of third parties. This is not the case of "a pecuniary interest of third parties bona fide acquired for valuable consideration." The defendant is seeking to establish that this is an exception within an exception. Suicide is the exception and the third parties are the exception within that exception. The onus is on the defendant to establish this position affirmatively: see *Rowett, Leakey & Co.* v. *Scottish Provident Institution.* (2) The term "third party" means a party other than the assurance company or the assured.

(1) L. R. 7 Eq. 394. (2) [1927] 1 Ch. 55, 69.

G. B. Hurst K.C. and *A. T. James* for the defendant. The case is covered by *White's Case.* (1) The expression "third party" includes an assurer who advances money on the policy and becomes an assignee of the policy: see Porter's Laws of Insurance, 6th ed., p. 139. The analogy to the phrase "other persons" interpreted in *White's Case* (1) is very strong. The idea of a clause of this kind is to render the policy more valuable as a negotiable security: *Cook* v. *Black* (2); *Solicitors and General Life Assurance Society* v. *Lamb.* (3) Seeing that the condition is for the benefit of the assured, upon the analogy of the judgment in *White's Case* (1) it is difficult to see why the assurance company should be in a more favourable position than any other person because they have issued the policy. *White's Case* (1) is confirmed by *City Bank* v. *Sovereign Life Assurance Co.* (4) When parties acquire a different status from that which they had under the contract they are "third parties."

Gavin Simonds K.C. in reply.

TOMLIN J. This is an action in which the Royal London Mutual Insurance Society, Ld., are seeking to enforce a security given to them by one Albert Stanley Davies against the legal personal representative and residuary legatee of Albert Stanley Davies.

The mortgage security consists of a mortgage created on February 1, 1927, to secure 850*l.* with interest at 6 per cent. upon a sub-demise of a certain leasehold house, No. 57 Balmoral Road, Newport, and a policy which on December 21, 1926, had been issued by the plaintiff company to Davies upon his own life to secure payment of 900*l.* without profits, at an annual premium of 36*l.* 18*s.*

Now the only point which arises in the action is upon the construction of one of the conditions of the policy, and it arises in this way, that on July 9, 1927, Davies committed suicide, and one of the conditions of the policy (condition 5)

(1) L. R. 7 Eq. 394.
(2) (1842) 1 Hare, 390, 394.
(3) (1864) 1 H. & M. 716, 724; 2 D. J. & S. 251.
(4) (1884) 50 L. T. 565.

TOMLIN J.
1928
ROYAL LONDON MUTUAL INSURANCE SOCIETY v. BARRETT.

is this: [His Lordship read the condition and continued:] Now the suicide of Davies is not in question. That is admitted, and the policy, therefore, is void under clause 5, except so far as it may fall within the exception, and it is alleged on the one hand by the company that it does not fall within the exception, because it is not a case where there is any pecuniary interest of third parties bona fide acquired for valuable consideration, the assurer alleging that the assurer is not within those words, and on the other hand, the defendant says that the expression "pecuniary interest of third parties bona fide acquired for valuable consideration" is wide enough to cover a case where the assurer himself advances money on the policy and the policy is assigned to him.

Of course, the result will be, if the company is right, that they can enforce their charge against the leasehold house and need not take account of the policy at all, that being wholly void, whereas, if they are wrong, the policy is in force to the extent of the mortgage money, which is in fact somewhat less than the policy—850*l.*, I think, as against 900*l.*—and by virtue of a clause in the mortgage the insurance company would have to satisfy themselves primarily out of the policy moneys, with the result that the leasehold house would go free.

That is the problem. It is a problem confined to the construction of the instrument, and I think it is proper to approach it in this way. First of all to consider what is the natural and primary meaning of the words, and then to consider whether there is any part of the clause or of the policy which justifies or compels any departure from the primary and natural meaning of the words, or whether there is any rule of construction or authority which demands that such a departure should be made.

Now, taking the question of the natural and primary meaning of the words, it seems to me that the third party there is a third party by reference to those who are concerned in the contract of assurance. In other words, I think the phrase means a third party with reference to the assurer

and the policy holder, and possibly the assured, because the policy holder and the assured may conceivably be different persons. But it seems to me that it is impossible to say there that "third party" means "anybody other than the assured," or "anybody other than the policy holder," and that it therefore includes the assurer. Therefore the prima facie meaning of these words must be, I think, this, that the policy shall remain in force to the extent of the pecuniary interest of anybody other than the assurer or the assured bona fide acquired for valuable consideration.

Now there is nothing in the language of the clause which invites or justifies a departure from that. The proviso that notice in writing shall be received and admitted by the directors at least one month before the date of death certainly does not invite any departure from that; so far as it has any bearing at all, it is more consistent with the primary and natural meaning than with any artificial meaning.

It is said by Mr. Hurst and Mr. James on behalf of the defendant that I ought to attach some special sense to "third parties," as distinct from "third persons," and that, where the assurer takes upon himself a new character (that is the character of an assignee of the policy in addition to his original character as assurer), he, within the meaning of this language, becomes a third party, although in some of his aspects he still remains a first party. I do not think there is anything in the language to justify any such distinction.

The question is, having arrived at the natural meaning of the words and having found nothing in the clause itself which justifies any departure from it, is there any rule of construction, or any authority, which ought to lead me to take a different view? Now the only rule of construction, so far as I know, is the old rule of construing a document contra proferentem. That that rule applies to policies of assurance, of course, is undoubted, and it is so stated by Warrington L.J. in the case of *Rowett, Leakey & Co.* v. *Scottish Provident Institution* (1), but it has to be borne in mind that that only becomes material when a real ambiguity exists, and in my

(1) [1927] 1 Ch. 55, 69.

TOMLIN J.
1928
ROYAL LONDON MUTUAL INSURANCE SOCIETY v. BARRETT.

view there is no real ambiguity here. The language, in my opinion, is plain language, having an undoubted natural meaning, with nothing attached to it to suggest any departure from the natural meaning. But even if it were otherwise, and even if this was treated as a case of ambiguity, it must be remembered that what we are construing here is something in the nature of an exception out of an exception, and that, that being so, he who asserts a particular view of the exception is for this purpose in the position of "proferens"; and it may be that, if any such doctrine as I have mentioned is to be applied, it is to be applied against him. However, my own view is that there is no rule of construction affecting this particular case which requires me to depart from the natural meaning.

Then it remains to consider authority. There are, I think, only two cases in the books, so far as my attention has been called to them, which have any real bearing on it. The first is the case of *Solicitors and General Life Assurance Society* v. *Lamb* (1), which came in the first instance before Wood V.-C. and afterwards before the Lords Justices. That was a case where the policy of assurance contained a provision that if the assured should die by his own hand the policy should be void except to the extent of any interest acquired therein by actual assignment by deed for valuable consideration. He, in fact, assigned the policy as security with other property to a third person and then committed suicide; and the point in the case was this, that the assurance company said that the mortgagee, having a number of properties in his hands as security for his debt, was bound either to throw the debt upon the properties other than the policy, so that the policy might be left in the position of not being a security for anything at all, or else that the amount owing by the security ought to be rateably apportioned between the several properties, including the policy, so that the amount secured on the policy was thereby diminished, the result being, either that the insurance company would get off payment altogether, or would have to pay very much less. It was held both

(1) 1 H. & M. 716; 2 D. J. & S. 251, 258.

by the Vice-Chancellor and by the Lords Justices that that view of it was not sound; there was no equity which entitled the insurance company to have any such marshalling as they claimed. There seems to have been no question of the construction of the clause; the question was whether, having regard to the clause, the assurer was entitled to have a marshalling of the kind that I have indicated. In the course of their judgments the Lords Justices made some observations about the condition in the policy, and Turner L.J. said: "To construe this condition as importing that the assured was not as between him and the office to have any benefit of the policy would indeed, as it seems to me, be directly to contradict the very terms of the condition, for the condition in terms imports that the policy is to be valid to the extent of any interest acquired therein by assignment for value." In other words, he is saying: "In terms the condition says that it is to be valid to the extent of any interest acquired therein by assignment for value, and this proposition of the assurer is an attempt to defeat the plain meaning of the clause."

Now, that being so, it does not seem to me that that case throws any light upon the present case at all. Its interest, perhaps, may be that it shows the first form, historically an earlier form, of this clause, that is to say the clause which provided for the validity of the policy to the extent of any interest acquired by actual assignment. Now whether it is accidental or whether it is deliberate it is to be observed that this clause, in the cases as we advance, changes its form, and, in the next case to which I am going to refer, the form is changed to one which it is possible may have been devised for the very purpose of excluding the assurer from the exception. That is the case of *White* v. *British Empire Mutual Life Assurance Co.* (1), and there the clause was this: "Should any person assured, separately or jointly, die by his or her own hands, by the hands of justice, or by duelling, before the policy shall have been in existence three years, the policy in every such case shall be void, except to the

(1) L. R. 7 Eq. 394.

TOMLIN J.
1928
ROYAL LONDON MUTUAL INSURANCE SOCIETY v. BARRETT.

extent of any bona fide interest therein which at the time of such death shall be vested in any other person or persons for his, her, or their own benefit, for a sufficient pecuniary or other consideration, upon satisfactory proof of the creation, existence and extent of such interest: Provided that notice of such assignment shall have been received by the company at least one month previous to the death of the assured." Now whether that was intended by the draftsman to exclude the assurer or not I do not know. It is a change of form from the form used in the earlier case. At any rate, if it was so intended, it did not succeed, and it seems to me quite plain that Malins V.-C., who determined that case, determined as a matter of language that the phrase "other person or persons" meant "other" with reference to the assured, and therefore it was wide enough to include the assurer, where the assurer was an assignee of the policy, with the result that where, as here, the assurer advanced money to the assured on a mortgage of the policy and other property, the policy was held to be good notwithstanding the suicide of the assured, and was held to be valid to the extent of the mortgage debt due to the assurer at the death of the assured.

I have been invited by Mr. Hurst and Mr. James to come to the conclusion that the reasoning of the Vice-Chancellor was of a very elaborate kind, and that, in order to arrive at the conclusion that the assurer was not excluded from the words, he first of all held that the words did exclude him, and then proceeded on some general principle, which he found in the case of *Solicitors and General Life Assurance Society* v. *Lamb* (1) and elsewhere, to say that, although prima facie it did exclude him, he was bound to hold that it did not exclude him.

Now I do not think, myself, that there is any justification for that suggestion. The judgment, as it seems to me, propounds the simple question whether the company must be considered as being "other persons who have acquired an interest in the policy," and it gives an affirmative

(1) 1 H. & M. 716; 2 D. J. & S. 251.

answer to the question. In other words, it arrives at the goal by the shortest and easiest path. That being so, that case stands as no authority for a clause containing different language; and when we come to the case under consideration to-day we have got a third form. Whether it is accident or whether it is historical development, this may be another attempt of the insurance company to exclude themselves from the operation of this class of exception, and the question is whether at last they have succeeded. My own view, having regard to what I have said as to the natural and primary meaning of the words, is that they have succeeded, and, having found nothing in principle or on authority which compels me to take a contrary view, I must conclude that upon the true construction of this clause the expression "third party" does not include the assurer, and that, that being so, the assurer is entitled to proceed to enforce his security against the other property comprised in the mortgage.

There will, therefore, be a declaration that, on the true construction of the policy, in the events which have happened, the policy is void.

Solicitors: *Smith & Hudson; Mills & Morley, for H. M. Williams, Newport, Mon.*

J. L. D.

CLAUSON J.

1928

Jan. 24.

In re SCHNAPPER.

[1927. S. 071.]

Infant—Legacy—Payment out of Court—Majority according to Law of Domicil.

Funds in Court standing to the credit of an infant, having a foreign domicil, ordered to be paid out to her on her attaining the age of eighteen, being her full age according to the law of her domicil.

PETITION by Edith Betty Schnapper of Frankfurt-on-Maine in Prussia, an infant according to the law of England, petitioning by her next friend. The petition was presented in pursuance of the Trustee Act, 1925, for payment out to her of a fund in Court representing a legacy of 1000*l.* bequeathed by the will, dated January 25, 1922, of Siegmund Alfred Schnapper. The testator died on October 10, 1922, and on November 21, 1923, the executors of his will paid the legacy into Court under the provisions of the Trustee Act, 1893, to the credit of "Legacy to Edith Betty Schnapper, an infant (beyond seas) under the will of Siegmund Alfred Schnapper."

The petitioner was of German nationality, and at the date of the testator's death and at the date of the petition was domiciled in Prussia. She was at the testator's death thirteen years of age, and attained the age of eighteen on October 31, 1927, whereupon a decree was made by the District Court of Frankfurt-on-Maine declaring the petitioner to be of age. Evidence was adduced to show that, according to the law of Prussia, she then became competent to receive moneys and to take a transfer of and hold securities and to give valid receipts therefor.

G. G. Solomon for the petitioner. In *In re Hellmann's Will* (1) executors were held to be entitled to pay a legacy to a legatee who had attained her majority according to the law of Hamburg where she was domiciled, and in *Donohoe* v. *Donohoe* (2) payment out of a fund in Court was ordered in circumstances similar to the present.

(1) (1866) L. R. 2 Eq. 363. (2) (1887) 19 L. R. Ir. 349.

CLAUSON J. 1928 SCHNAPPER, *In re.*

CLAUSON J. I will make an order that the funds in Court representing the legacy be sold, and that the residue of the proceeds of sale, after payment of the costs of the petition, be paid to the petitioner.

The order will be prefaced as follows: "The Court being of opinion that the petitioner is competent to give a receipt for her legacy, notwithstanding that she is under the age of twenty-one years, she having attained her majority according to the law of the place of her domicile, that is to say, the law of Prussia, in Germany."

Solicitors: *Adler & Perowne.*

H. C. H.

In re DAWSON'S SETTLED ESTATES.

CLAUSON J. 1928 *Feb.* 9.

[1927. D. 2012.]

Law of Property—Transitional Provisions—Land held in Equity in undivided Shares vested in Possession—Entirety of Land vested in Trustees in trust for Persons entitled in undivided Shares—Settled Land—Will—Construction—Devise to Trustees—Extent of Devise—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *Sch. I., Part IV., para.* 1, *sub-paras.* 1 *and* 3—*Wills Act,* 1837 (1 *Vict. c.* 26), *s.* 31.

By the will of a testator who died in 1884, his real estate was devised to trustees upon trust to permit his widow to receive the rents thereof during her life, and after her decease upon trust to pay the same to or for the benefit of such of his two daughters E. and M. as should be then living and should for the time being be single and unmarried in equal shares if more than one, and when both should be married upon trust as to both capital as well as income for all the testator's children in equal shares.

The testator's widow died in 1889, and upon the death of E. in 1927 questions arose as to the respective interests of E. and M. and the testator's children in the income and capital of the real estate. Clauson J. having held that, upon the true construction of the will and in the events which had happened, E. and M. were entitled to the income of the real estate during their joint lives in equal shares, and that upon the death of E. her sister M. became entitled to the whole of the income during her spinsterhood, and that upon her marriage or death the whole estate would become divisible in equal shares between the children of the testator, the further question then arose whether upon the Law of Property Act, 1925, coming into force the devised real estate vested

CLAUSON J.

1928

DAWSON'S SETTLED ESTATES, *In re.*

in the then surviving trustee of the will upon the statutory trusts under sub-para. 1 of para. 1 of Part IV. of the First Schedule to that Act or in her or the Public Trustee under sub-para. 3 thereof:—

Held, first, that, as the purposes of the trusts of the testator's will were such as might continue beyond the life of his widow, the real estate devised by the will was, at the date of the Law of Property Act, 1925, coming into force, by the effect of s. 31 of the Wills Act, vested in the then surviving trustee of the will in fee simple in trust for E. and M. who were then beneficially interested in equity until one of them should marry or die in undivided shares vested in possession. Secondly, that although their interests were not absolute interests, the case fell within sub-para. 1 of para. 1 of Part IV. of the First Schedule to the Act of 1925, and the real estate thereupon vested in the trustee of the will upon the statutory trusts; and further, that, when a case falls within the first of the sub-paragraphs, it will not become necessary to consider whether it falls within any of the subsequent sub-paragraphs.

ORIGINATING SUMMONS.

Robert Dawson by his will dated November 2, 1883, devised and bequeathed all his real and personal estate unto his son George Hurst Dawson and his daughter Elizabeth Ann Dawson (whom the testator appointed trustees and executors thereof) upon trust to permit his wife Elizabeth Ann Dawson and her assigns to have the use and enjoyment and to receive the rents interest and annual income of his real and personal estate during her life she and they keeping any buildings fully insured and repaired And after her decease upon trust to pay such rents interest and annual income to or for the benefit of such of his two daughters Elizabeth Ann Dawson and Mary Sandwell Dawson as should be then living and should for the time being be single and unmarried in equal shares if more than one and when and as soon as both his said daughters should be married and subject to the trusts and directions thereinbefore contained upon trust as to all his real and personal estate capital as well as income for all his children in equal shares absolutely.

The testator died on May 6, 1884, and his will was proved by the executor and executrix thereof on June 9, 1884. He left surviving him his widow Elizabeth Ann Dawson, the first tenant for life, who died on March 21, 1889, and six children, of whom John Dawson died on February 13, 1894, George Hurst Dawson died on February 3, 1923, and

Elizabeth Ann Dawson died on January 22, 1927, whereupon questions arose as to who, upon the true construction of the will and in the events which happened, were the persons entitled to the income and capital of the testator's estate; and an originating summons was taken out by Mary Sandwell Dawson, the survivor of the two daughters named in the will, for the determination of those questions. For the purposes of this report it is sufficient to state that Clauson J. held that during their joint spinsterhoods the two daughters Elizabeth Ann Dawson and Mary S. Dawson were tenants for life of the income of the estate in equal shares, that the plaintiff on the summons, after the death of her sister Elizabeth Ann Dawson, was entitled during her spinsterhood to the whole of the income and that upon her marriage or death the whole of the estate would become divisible in equal shares between all the children of the testator then living and the estates of those children who should be then dead.

The other question raised by the summons was whether upon the coming into force of the Law of Property Act, 1925, and by virtue of Part IV. of the First Schedule thereto the real estate of the testator vested (1.) under sub-para. 1 of para. 1 in Elizabeth Ann Dawson as the surviving trustee of the will or (2.) under sub-para. 3 of para. 1, in (*a*) Elizabeth Ann Dawson as surviving executrix of the will and, as such, trustee for the purposes of the Settled Land Act, 1925, of the settlement created by the will or (*b*) in the Public Trustee, and in each case upon the statutory trusts as defined by s. 35 of the Law of Property Act, 1925.

E. M. Winterbotham for the plaintiff. At the date of the coming into force of the Law of Property Act, 1925, the testator's two daughters were entitled in undivided shares in possession. Accordingly, Part IV. of the First Schedule to the Act applied. The question is which sub-para. of para. 1 applies to this case. Literally the case falls within both sub-paras. 1 and 3; for, the land was vested in the surviving trustee for some estate at least and also the land

CLAUSON J. 1928 DAWSON'S SETTLED ESTATES, *In re.*

was settled land. It may be necessary to determine what estate the trustees took. As the trustees only had duties to perform during the joint lives of the daughters and the life of the survivor, they only took an estate for those lives in accordance with the old rule: Hawkins on Wills, 3rd ed., p. 184; Jarman on Wills, 6th ed., vol. ii., pp. 1842, 1843; *Blagrave* v. *Blagrave*. (1) Sect. 31 of the Wills Act, 1837 (2), does not apply. If the trustees only took an estate pur autre vie it may be said that sub-para. 1 cannot apply, but that paragraph does not require any particular estate to be vested in the trustees. If the trustees took the fee simple sub-para. 1 clearly applies, unless sub-para. 3 applies and thus prevents sub-para. 1 from applying.

[CLAUSON J. Will it be said that sub-para. 1 applies only where the equitable owners are absolutely entitled?]

Astbury J. has decided the contrary in *In re Myhill*. (3) In *In re Higgs & May's Contract* (4), referred to in that case, it made no difference which of the sub-paras. 1 and 3 were applied. It was assumed without argument that sub-para. 3 applied. The same is true of two other cases. (5)

[CLAUSON J. If the land is settled land does not sub-para. 3 apply and, if so, why should I look at sub-para. 1?]

The same argument can be applied in favour of sub-para. 1. The land is "vested in trustees," therefore sub-para. 1 applies. Further, this is the most natural result. The object of the whole of this part of the Schedule is to find suitable persons in whom to vest the land as trustees for sale. When the testator has appointed trustees, it is not necessary to look

(1) (1849) 4 Ex. 550, 568, 569.

(2) Sect. 31 of the Wills Act, 1837: "Where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple or other the whole legal estate which the testator had power to dispose of by will in such real estate and not an estate determinable when the purposes of the trust shall be satisfied."

(3) Ante, p. 100.

(4) [1927] 2 Ch. 249.

(5) *In re Flint* [1927] 1 Ch. 570 and *In re Colyer's Farningham Estate* [1927] 1 Ch. 677.

further. To treat sub-para. 3 as overriding sub-para. 1 might vest the land out of personal representatives before they had completed administration.

Charles Harman for the legal representative of the deceased son John Dawson. It is immaterial whether the trustees have the legal estate in fee or only for lives. So long as the trustees have some estate or interest sub-para. 1 will apply. The policy of the Act is to create a trust for sale in the case of undivided shares.

[CLAUSON J. The sub-para. 1 speaks of some estate being vested in the trustees. Is the meaning of sub-para. 1 that if there is some estate vested in trustees, less than the fee simple, then only that particular estate of the trustees is to be held on the statutory trusts ?]

In that case, it is submitted that the whole fee simple is held upon the statutory trusts. It is not necessary to inquire what estate or interest the trustees have ; if only they have some estate, that will be sufficient, and they will hold the fee simple upon the statutory trusts. If a case is found to fit sub-para. 1, it becomes unnecessary to consider whether some other subsequent sub-paragraph applies to the case. The subsequent sub-paragraphs are intended to provide for a case not covered by a preceding sub-paragraph.

L. F. Mumford for another child of the testator.

Harold A. H. Christie for the testator's eldest son and the legal representative of the deceased son George Hurst Dawson. The case is covered by s. 31 of the Wills Act. The first beneficial interest is given to the widow for life and then a second beneficial interest is given to the two daughters during their lives and the life of the survivor. That second beneficial interest is given by way of an active trust. The case falls within the language of s. 31. The purposes of the trust continue beyond the life of the widow, to whom a beneficial interest is given for life, with the result that the case falls exactly within sub-para. 1.

E. M. Winterbotham in reply on s. 31 of the Wills Act. There are no trusts continuing under the will beyond the lives of the two daughters. The trusts do not commence until the

CLAUSON J. 1928 DAWSON'S SETTLED ESTATES, *In re.*

life interests of the daughters come into possession after the death of the widow. During the first life interest the trusts are passive trusts and the legal estate is vested in the widow. The result is that s. 31 does not apply to this case : Underhill on Trusts and Trustees, 8th ed., pp. 194, 195 ; and Jarman on Wills, 7th ed., vol. ii., p. 1843.

CLAUSON J. I have delivered my judgment upon the questions of construction raised by the first part of the summons and determined the interests of the various parties claiming to be interested in the testator's estate. The effect of my decision is as follows : there is a gift in the will of the real and personal estate to the trustees upon trust, in the first place to permit the widow to receive the income during her life. Pausing there, as the law stood before the Wills Act, 1837, the effect of that gift standing alone was to vest in the widow an estate in the land at law for her life. Then, after the decease of the testator's widow, there is a trust to pay the income to or for the benefit of his two daughters Elizabeth and Mary as tenants in common during their joint lives and on the marriage or death of either to or for the benefit of the survivor of them and on the marriage or death of the survivor, then the trustees are to hold the estate, both capital and income, in trust for the testator's children in equal shares. According to the law, apart from any provision in the Wills Act, as established by the authorities, the widow took, as I have stated, a legal estate in the land for life ; and upon her decease the trustees took the legal estate for the duration of the interests of the two daughters Elizabeth and Mary and the survivor of them ; after the determination of their interests the legal estate would be vested in the testator's children in undivided shares. That being the position of the testator's estate upon the construction of the dispositions contained in his will, the first point that I have to consider is the effect, if any, upon that construction of s. 31 of the Wills Act, 1837, a section of the Act which has been a puzzle for several generations of practitioners and as regards which slight assistance is to be gained from

reported cases or the text-books. [His Lordship then read s. 31 of the Act and continued:] By the will the trustees to whom the testator's real estate was devised, were to hold it upon trust to permit his widow to receive the rents thereof for life; consequently, a beneficial interest in the rents of the real estate was given to her for life; and, although it is true there is no trust continuing beyond the life of the survivor of the two daughters, yet as there are trusts to be performed after the death of the widow, in that it then became the duty of the trustees to pay the rents to or for the benefit of the two daughters Elizabeth and Mary during their lives and to the survivor during her life, it is true to say that the purposes of the trust continued beyond the life of the widow to whom the first beneficial interest for life was given. From that it follows that through the operation of s. 31 of the Wills Act the effect of the devise to the trustees was, in my judgment, to vest in the trustees the fee simple of the real estate.

Therefore, on December 31, 1925, immediately before the Law of Property Act, 1925, came into operation, the first tenant for life being then dead, the position was that the then surviving trustee of the will had vested in her the fee simple of the land, and the two daughters Elizabeth and Mary were beneficially entitled to the rents during their joint lives so long as they remained unmarried in undivided shares vested in possession. There is no question that the words in para. 1 of Part IV. of the First Schedule to the Law of Property Act, 1925, "held in equity in undivided shares vested in possession" are satisfied by life interests in possession, so that at the crucial date the land was held precisely in the manner so described in the opening words of para. 1—namely, "in equity in undivided shares vested in possession." That being so, the Act then says by para. 1 that the following provisions are to have effect. [His Lordship then read sub-para. 1 and continued:] The question is, whether the entirety of the land was, at the crucial date, vested in trustees in trust for persons entitled in equity in undivided shares. The land in question was vested in the then surviving

CLAUSON J. 1928 DAWSON'S SETTLED ESTATES, *In re.*

trustee of the will in trust for herself and her sister Mary in undivided shares and after the marriage or death of the survivor of them in trust for the testator's children in undivided shares. As was said by Astbury J. in *In re Myhill* (1), the words "entitled in equity in undivided shares" are used in the general sense of having a present interest in undivided shares and are not confined to absolute interests. In my judgment, the present case is precisely covered by sub-para. 1, with the result that the land is to be held by the trustees upon the statutory trusts as defined by s. 35 of the Act of 1925. It is clear that the next sub-para. 2 does not apply to this case. Then sub-para. 3 relates to a case where the entirety of the land is settled land. Now having regard to the provisions of the will, it is not disputed that the land devised was at the crucial date settled land, and it has been suggested that if that be the case the land falls within sub-para. 3 and became vested in the trustees of the settlement created by the will for the purposes of the Settled Land Act, 1925. But as the law then stood there were no such trustees of the will. If the case falls equally under either sub-para. 1 or sub-para. 3, the question is under which of those sub-paragraphs must the case be treated as falling. That question came forward for consideration in *In re Myhill* (1), but it was not found necessary to decide the point. In my judgment the proper solution of the question is to be found by reading sub-para. 1 first of all; if the case in point is found to be covered by its provisions, then, in my judgment, there is no need to go further. Those sub-paragraphs following sub-para. 1 are, in my opinion, intended to provide for cases which are not covered by any preceding paragraph. I am assisted in arriving at this view by the language of sub-para. 4, which provides for any case "to which the foregoing provisions of this part of this Schedule do not apply."

There will be a declaration that upon January 1, 1926, the testator's real estate by force of sub-para. 1 of para. 1 of Part IV. of the First Schedule to the Law of Property Act,

(1) Ante, p. 100.

1925, vested in Miss Elizabeth Ann Dawson as the surviving trustee of the will upon the statutory trusts—namely, upon trust for sale and to apply the proceeds according to s. 35 of that Act.

CLAUSON J.
1928
DAWSON'S SETTLED ESTATES, *In re.*

Solicitors for all parties: *Patersons, Snow & Co., for K. & W. Daniel, Ramsgate.*

H. C. H.

In re CATCHPOOL.

HARRIS *v.* CATCHPOOL.

[1928. C. 197.]

RUSSELL J.
1928
March 7, 8, 12.

Settled Land—Will—"Land held under one and the same settlement"—Vesting in trustees—"Trustees (if any) of the settlement" mean Trustees of the Settlement under the old Law—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *Sch. I., Part IV., para.* 1, *sub-para.* 3—*Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *s.* 30, *sub-s.* 3.

Where immediately before the coming into operation of the Law of Property Act, 1925, the entirety of the land is settled land held under one and the same settlement it vests in the trustees (if any) of the settlement under the old law as joint tenants upon the statutory trusts. If there are no such trustees then, pending their appointment, the land vests in the Public Trustee upon the statutory trusts.

ADJOURNED SUMMONS.

By his will Thomas Catchpool, who died on May 4, 1877, settled his real estate upon certain trusts. The last surviving trustee of the settlement died on December 23, 1915, having appointed his wife, the defendant Florence Emma Catchpool, sole executrix of his will. Immediately before the coming into operation of the Law of Property Act, 1925, Florence Emma Catchpool was the sole surviving personal representative of the will of Thomas Catchpool.

Paragraph one of the summons asked: (1.) Whether in these circumstances by virtue of para. 1, sub-para. 3, of Part IV. of the First Schedule to the Law of Property Act, 1925, the entirety of the land was now vested in the said

RUSSELL J. 1928 CATCHPOOL, *In re.* HARRIS *v.* CATCHPOOL.

Florence Emma Catchpool, the executrix by representation of the testator, upon the statutory trusts, as being, under s. 30, sub-s. 3, of the Settled Land Act, 1925, the trustee of the settlement, or (2.) whether at the commencement of the Law of Property Act, 1925, there were no trustees within the meaning of the said sub-paragraph, and, under proviso (i.) thereof, the entirety of the property, pending the appointment of such trustees, vested in the Public Trustee?

The summons also asked, in the event of the Court holding that the entirety of the land was now vested in the Public Trustee, that certain named persons should be appointed trustees of the settlement, and that, the Public Trustee not having been requested to act, service on him might be dispensed with.

Hubert A. Rose for the plaintiff, tenant for life of the settled land. Para. 1, sub-para. 3, of Part IV., First Schedule to the Law of Property Act, applies, and therefore the entirety of the land vested in the trustees of the settlement, if any, and if none, in the Public Trustee. If the words, "trustees of the settlement," in sub-para. 3, mean the trustees under the old law then, as there were no such trustees, the entirety has vested in the Public Trustee; but if "trustees of the settlement" mean the trustees under the new law, then the entirety has vested in Florence Emma Catchpool, the executrix by representation of the testator, under s. 30, sub-s. 3, of the Settled Land Act, 1925.

Prima facie under the definition sections (Law of Property Act, 1925, s. 205, sub-s. 1 (xxvi.); Settled Land Act, 1925, s. 117, sub-s. 1 (xxiv.)) trustees of the settlement mean the trustees under the new law, unless the fact that the expression occurs in a transitional provision makes that construction inconsistent with the context: *In re Ryder and Steadman's Contract.* (1) Further the use of the present tense, in the words introducing the provisoes to sub-para. 3, suggests that the moment at which the absence of trustees is contemplated is the same as the moment at which the

(1) [1927] 2 Ch. 62, 75, 80.

land to be operated on is regarded—namely, immediately before 1926. On the other hand, although it may be argued that the transitional nature of the provisions shows that their subject-matter (the land) must be ascertained by regarding its state immediately before 1926, yet it may well be that the recipients of that subject-matter are to be ascertained under the new law which operates when the transition has been effected. Moreover proviso IV. to sub-para. 3, which contemplates the appointment of Settled Land Act trustees out of Court, and appears to refer to appointments under s. 30, sub-s. 1 (*v.*), or s. 30, sub-s. 3, of the Settled Land Act, 1925, shows that the absence or presence of trustees of the settlement depends on the new law because, on the contrary view, appointments under s. 30, sub-s. 3, would be impossible.

Charles Romer for the defendants, Florence Emma Catchpool, the three sons of the plaintiff, entitled in remainder, and the Public Trustee. "Before the commencement of this Act" is the time at which the land is considered and affected by these transitional sub-paragraphs: *In re Ryder and Steadman's Contract.* (1) Therefore as this land was held under one settlement, the will, and there were no trustees under the old law, the land vests in the Public Trustee.

Cur. adv. vult.

March 12. RUSSELL J. It is clear that this case falls within sub-para. 3 of para. 1 of Part IV. of the First Schedule to the Law of Property Act, 1925. The entirety of the land was settled land held under one and the same settlement—namely, the will of Thomas Catchpool. Under the provisions of sub-para. 3 the land would, on the coming into operation of the Act, vest in the trustees of the settlement if there were any such trustees, and if there were no such trustees then it would vest in the Public Trustee pending their appointment.

The question to be decided is whether at the relevant

(1) [1927] 2 Ch. 62, 75.

RUSSELL J. 1928 CATCHPOOL, *In re.* HARRIS *v.* CATCHPOOL.

moment of time there were or were not any trustees of the settlement within the meaning of sub-para. 3. This depends upon whether you are to look for persons who would be trustees of the settlement within the provisions of the old Settled Land Acts, or for persons who would be trustees of the settlement within the provisions of the Settled Land Act, 1925. If the former, then in the present case none are to be found; if the latter, then the legal personal representative of the testator is available under s. 30 of the Settled Land Act, 1925.

It has been decided by the Court of Appeal that for the purpose of ascertaining under sub-para. 2 whether land is not settled land, or under sub-para. 3 whether land is settled land, you must have regard to the law as it existed before the commencement of the Act: *In re Ryder and Steadman's Contract.* (1)

In my opinion it follows from that decision and the reasons given in the judgments in support of it, that the words "the trustees (if any) of the settlement" refer to persons who were trustees of the settlement under the old law. Sargant L.J., in particular, uses language which appears to me to lead to this result, where at p. 80 he says: "Now the transitional provisions in Part IV. are for the very purpose of changing the legal position existing previously to the Act into a new legal position, to take effect under and subsequent to the Act. And, when in the course of so doing the Act defines the position existing previously to the Act, the definition must naturally, and indeed almost inevitably, refer to the law as it stood before the Act, and can hardly, without some confusion of thought, be importing into that definition a state of law which is only to exist after the Act."

The result is that the land has vested in the Public Trustee pending the appointment of trustees. Here the Public Trustee has not become entitled to act in the trust; therefore if trustees of the settlement are appointed, the land will vest in them as joint tenants upon the statutory trusts.

(1) [1927] 2 Ch. 62, 80.

I am accordingly asked to appoint trustees of the settlement. I will make a declaration in the terms of the second alternative in para. 1 of the summons. I will appoint the persons named in the summons to be trustees of the settlement, and I dispense with service on the Public Trustee.

Solicitors: *Charles Russell & Co., for Elwes, Turner & Smith, Colchester.*

J. B. B. M.

In re ACHILLOPOULOS.

JOHNSON *v.* MAVROMICHALI.

[1926. A. 2440.]

Administration—Foreign Will—English Assets—Appointment of "heirs" under foreign Will—Attorney-Administrator—Foreign Principal—Distribution of English Assets—As to valid Receipt by "heirs"—Position of Foreign Executors—Effect of Law of Domicil—Provision for Foreign Debts—Issue of Advertisements in foreign Newspapers by Attorney-Administrator—Form of Order on Distribution.

Where administration is taken out in this country by the attorney of a foreign principal in respect of English assets belonging to a foreign testator, and the foreign principal is not by the law of the domicil an executor, but by virtue of his interest under the foreign will is charged by the law of the domicil with the duties which under English law are imposed on an executor, the Court will authorize such administrator, after satisfying all English liabilities and all foreign liabilities of which he has notice, to hand over the surplus in his hands to the foreign principal, whose receipt will be a good and sufficient discharge.

In such a case the administrator need not issue any foreign advertisements or take any active steps abroad to ascertain the position with regard to debts, as the foreign principal, who by the law of the domicil is in the position of an executor, is in such a case directly responsible for the payment of foreign debts.

ORIGINATING SUMMONS.

By his will dated March 28, 1910, Sophocles Konstantin Achillopoulos (hereinafter called "the testator"), a Greek banker, residing at Alexandria in Egypt, appointed as his "heirs" his wife Sofia S. K. Achillopoulos (who predeceased

TOMLIN J. 1927 ACHILLOPOULOS, *In re.* JOHNSON *v.* MAVROMICHALI

him), and his three daughters (defendants to the summons), Maria (wife of A. T. Mpasia(1)), Helen (wife of N. G. Theotoki), and Aristis S. K. Achillopoulos. The testator gave to each of his said three daughters one-third of one-third of his estate absolutely, and as to the remaining two-thirds he gave the income arising therefrom to his wife for life, and after her death, as to three-fourths of such two-thirds of his estate, to his said three daughters, subject to certain conditions, and the remaining one-fourth to the Greek nation subject to certain conditions. And after making certain legacies as in the will more particularly mentioned, the testator appointed as his executors his said wife, his sons in law, A. T. Mpasia and N. D. Theotoki (both since deceased), his chief clerk, K. D. Kaloglopoulon, and Sir Everard A. Hambro, K.C.V.O. By a codicil dated May 3, 1916, the testator revoked the appointment of Sir E. A. Hambro as an executor of his will, and in his place appointed Petros K. Mavromichali, the husband of his said daughter Aristis (one of the defendants, and who had married since the will), as an executor thereof.

The testator died at Alexandria on March 12, 1924, at a very advanced age. At the date of his death—although he had resided for a considerable number of years in Alexandria, he still retained his Greek nationality—and although there was a doubt as to his domicil, yet, as he was a Greek national, all matters relating to his personal status and property were according to the evidence subject to Greek law. On March 13, 1924, the testator's will and codicil were in accordance with Greek law deposited with the Greek Consular Court at Alexandria, but no judicial act was performed by such Court. At the time of his death the testator was possessed of very considerable property, approximating in value to the sum of 2,000,000*l.*, of which there were considerable English assets to the value of 80,000*l.* or thereabouts. Such assets consisted of various registered stocks in English companies, standing in the names of certain

(1) In modern Greek the sound of *b* can be expressed only by the combination *mp*.—F. P.

English banks, and certain accumulations of money on deposit at such banks.

It having become necessary that administration should be taken out in England in respect of the English portion of the estate, a power of attorney was given by the defendant, Aristis Mavromichali (the daughter of the testator, and one of the "heirs" mentioned in the will), to the plaintiff, Percy M. Johnson, for that purpose, and on January 30, 1925, letters of administration with the will and codicil annexed, were granted by the Principal Probate Registry to the said P. M. Johnson as the lawful attorney of the said Aristis Mavromichali for her use and benefit in respect of such English assets, and until further representation should be granted. The attorney-administrator duly paid the estate duty and other duties on the testator's English assets, and all English liabilities of which he had notice, and issued the usual advertisements in the Times and London Gazette for claims of creditors to be sent in, but did not issue any advertisements in any foreign newspaper. The plaintiff was desirous of handing over the testator's English property and assets to the three defendants as being the persons designated as heirs in the will, but before doing so desired to obtain the directions of the Court as to how he should proceed, as to what steps he should take to ascertain to whom he should pay such assets, and as to how he should procure a good discharge on payment over to the proper persons.

The opinion of eminent Greek lawyers was obtained, which showed that by Greek law the property of a testator vested wholly and exclusively in his heirs, who alone could administer the property of the deceased, the executors of a will merely exercising supervisory functions, and that therefore the defendants, the three daughters of the testator, as "heirs," were able to give a valid receipt to the attorney-administrator.

An originating summons was accordingly taken out by the plaintiff, Percy M. Johnson, as the person to whom letters of administration with the will and codicil annexed had been granted as the attorney of the said Aristis Mavromichali for

TOMLIN J.
1927
ACHILLOPOULOS, *In re.*
JOHNSON *v.* MAVROMICHALI.

the following relief: (1.) That directions might be given to the plaintiff as such administrator as aforesaid as to what notices by advertisement he ought to issue for claims against the testator's estate, and (2.) that it might be determined whether the plaintiff was at liberty to hand over the assets of the testator come to his hands to the defendant Aristis Mavromichali or alternatively to the defendants jointly as such heirs of the testator, and generally that directions might be given as to how he should deal with such assets.

On the matter being adjourned into Court in March, 1927, after the case had been opened and a considerable amount of argument, a question arose as to whether each one of the heirs (defendants to the summons) was by Greek law able to deal with the estate apart from and independently of the other heirs, and the matter was ordered to stand over generally to consider the point.

As a result of inquiry a fresh power of attorney was obtained from all the three defendants, appointing the plaintiff and a Mr. Ralph Wordsworth the attorneys of the defendants for the purpose of obtaining fresh letters of administration. The addition of the said Ralph Wordsworth was rendered necessary under the provisions of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 160. Accordingly on December 16, 1927, fresh letters of administration with the will annexed were granted by the Principal Probate Registry to the original plaintiff and R. Wordsworth as the defendants' attorneys, and the former grant dated January 30, 1925, was revoked by order of the Probate Division of the High Court on July 7, 1927. The two survivors of the executors appointed by the testator's will were also ordered to be added as co-defendants to the summons—namely, Petros K. Mavromichali and Konstantinon D. Kaloglopoulon.

1927. March 15, 22. *W. Greene K.C.* and *L. Tillard* for the plaintiff, the attorney-administrator. The testator was of Greek nationality and probably domiciled in Alexandria. Under the Greek law the "heirs"—that is, the three

defendants—are the persons to administer the estate of a testator and give a good discharge, whereas the executors have a purely supervisory function. The testator's domicil is uncertain, but whether he was domiciled in Greece or in Alexandria is of not much importance to the question before the Court. The defendant, Aristis Mavromichali, has appointed the plaintiff, P. M. Johnson, as her attorney to obtain letters of administration with the will annexed in this country in respect of the English assets.

The two questions in the summons are very much bound up together. The first is, what is the duty of the attorney-administrator in a case like this regarding the ascertainment and payment of foreign debts? There does not appear to be any authority on this point, which is of considerable importance to attorney-administrators in general.

[TOMLIN J. I thought the law was that in such a case as this, where the main administration is elsewhere, the duty of an administrator here was to pay the English debts and to hand any surplus to the main administrator.]

There is no authority on the point. In fact on principle it may be the case that an attorney-administrator must pay not only English debts but also foreign debts, like any other administrator. He is in the same position as any other legal personal representative.

[TOMLIN J. Is he bound to seek out foreign debtors?]

That is the difficulty, and there is no authority which is of help. It would be very convenient if he need not be bound by advertisements to seek out creditors. Such advertisements are not always understood in foreign countries, and should be avoided.

[TOMLIN J. There is no obligation on an executor to advertise. He gets certain protection if he does, but he is not liable if he does not.]

If he wishes to get the protection under the new Trustee Act, 1925, s. 27, he has to insert such advertisements as the Court in an administration action would direct—that is, "notices elsewhere than in England and Wales, as would, in any special case, have been directed by a Court of competent

TOMLIN J. 1927 ACHILLOPOULOS, *In re.* JOHNSON *v.* MAVROMICHALI.

jurisdiction in an action for administration. . . . ." It does not leave the executor in a very satisfactory position, as he could not definitely know what the Court would order. In the present case the plaintiff might be sued, as the Court would probably under the circumstances have ordered advertisements in Egypt to be issued, and if he had not done so he could not claim the protection of the section. The question therefore is, is an attorney-administrator in a better position, that is, can he, after issuing the usual English advertisements, hand over the net surplus to the person who (under the law to which the principal is subject) will have to satisfy local debts ? It has been suggested that any advertisements issued abroad might invite claims, and should be avoided.

The second point is what after payment of all the debts is to be done with the surplus. The authorities are not clear, and are to some extent conflicting. One authority says if the attorney pays his principal he gets a good discharge, whereas another says that where the principal is not the duly appointed legal personal representative by a foreign Court, then the attorney cannot hand over the balance to such a principal. The present case is rather an intermediate one, because the heiresses by Greek law are persons without probate or letters of administration.

[TOMLIN J. It is clear the Greek law applies, and the question of domicil makes no difference.]

If the testator had been domiciled in Egypt it would be the same thing: *De la Viesca* v. *Lubbock* (1); *Eames* v. *Hacon*. (2)

[TOMLIN J. The judgment of Fry J. in *Eames* v. *Hacon* (2) was the one I had in mind, where he refers to *Chambers* v. *Bicknell*. (3)]

The dicta of Lord Westbury there referred to in Fry J.'s judgment are conveniently put in Dicey's Conflict of Laws, 3rd ed., p 714, n. (*g*). This decision of Fry J. does not really assist us now, based as it is on the footing that the Court

(1) (1840) 10 Sim. 629, 633.
(2) (1880) 16 Ch. D. 407, 408, 410; (1881) 18 Ch. D. 347.
(3) (1843) 2 Hare, 536.

should direct the residue to be handed over to the administrator in the country where the testator dies domiciled out of England.

With regard to the discretion of the Court no question arises if one looks at the proceedings in the Court of Appeal in *Eames* v. *Hacon* (1): see the judgment of Jessel M.R.

[TOMLIN J. Domicil on this theory must have something to do with it.]

There might of course be an attorney of a person who by the law of domicil has no beneficial interest in the estate, but the Master of the Rolls expressly puts his decision on the proposition that the attorney cannot refuse to pay his principal, and he refers to *De la Viesca* v. *Lubbock* (2) as an authority which had never been doubted or questioned. One should also look at the judgment of Lush L.J., who decides the question on a different basis.

The next case is that of *In re Rendell* (3), where letters of administration of the estate of a person who died in England having been granted to the attorney of the widow resident in America, and who was not the legal personal representative of the deceased, it was held that the principal could not give a good discharge to the attorney. There *Eames* v. *Hacon* (1) was not cited apparently. That was a decision of Cozens-Hardy J., and leaves open questions of difficulty, one being whether the decision really bears on the question whether domicil is to be taken into account at all.

[TOMLIN J. It seems to turn on there being no legal personal representative anywhere.]

Jessel M.R. in his judgment in *Eames* v. *Hacon* (1) rather seems to say that the matter is one of principle.

[TOMLIN J. I am not sure he goes as far as that. If there is some one in the position of a principal, such as a legal personal representative, you can pay over to him.]

Legal personal representative, by the law of what country? That is the difficulty.

(1) 18 Ch. D. 347, 350, 352, 353. (2) 10 Sim. 629.
(3) [1901] 1 Ch. 230, 231.

TOMLIN J. 1927 ACHILLOPOULOS, *In re.* JOHNSON *v.* MAVROMICHALI.

[TOMLIN J. Is he to be the legal personal representative of the domicil or will one do wherever he is ?]

In such a case one would have to go into difficult questions of domicil. The convenient course to take is to say that the principal is the person to receive the money from the agent—any principal in fact. If the test is that there should be a legal personal representative somewhere, there at once arises two difficulties. First, you may pay a man who in law has no title whatever by the only relevant law—namely, the law of domicil—to receive anything ; and secondly, if you adopt the principle, you must have somebody who is the administrator; and in a case like the present, where the law is that the heirs are without the intervention of anything like probate, and are entitled to collect the assets and discharge debts and give receipts, are they to be excluded ?

If you adopt that principle, they must be. It is submitted that where by the law of domicil (which is the law governing distribution) there are persons entitled to collect the assets without the grant of probate, the attorney can pay them the net surplus in his hands, that is where there is no question of debts.

With regard to the question of executors they merely exercise supervisory functions. That appears to be so by Greek law, and we have evidence from Greek experts on this. It shows that by Greek law the property of a testator vests wholly and exclusively in his heirs, who alone are entitled to collect and give a good receipt for the assets, that in a case of dispute a Greek Court could decide who were the heirs. Further, the executors merely exercise supervisory functions, and all duties of administration are performed by the heirs, who are responsible for the payment of debts and legacies.

It seems clear there is no proceeding by Greek law in the nature of obtaining probate. Our submission is that only English law is administered, and the person who by the law of the domicil can give a receipt is the person who by English law can give the attorney here a receipt.

[TOMLIN J. The reason why you mention the law of domicil is because you are administering English law, which alone recognizes the law of domicil as the dominant law.]

Yes. The decided cases on the question of distribution of the net surplus are somewhat conflicting, but one way of reconciling all the decisions would be to hold that the attorney can hand over the net surplus to his principal first, if that principal is a person who by law is bound to administer properly funds coming to his hands, because he has been clothed with the position of legal personal representative by a judicial or a semi-judicial act in some country; or secondly, where you have under the law of domicil (which ex hypothesi is the appropriate law), and somebody, such as the "heir" in this case, who is ipso facto by law under obligation to distribute the property among those beneficially entitled. To put forward the proposition that an attorney can properly pay his principal—merely because he is the principal—where the principal is not under any legal obligation to deal properly with the money after payment over is wrong, and it is submitted the authorities do not go as far as that.

On the question of foreign debts also, it might well be that where the principal is a person who is a legal personal representative by foreign law, then the attorney could safely pay to him the surplus in his hands after satisfying the debts here and any foreign debts of which he had notice, but without being under any obligation to go out of his way to seek foreign creditors by means of advertisements or otherwise. In *De la Viesca* v. *Lubbock* (1) the question of debts was not raised, though in *Eames* v. *Hacon* (2) they are referred to. As to the obligations of an attorney-administrator see *In re Dewell.* (3)

[TOMLIN J. The point is, the attorney-administrator may be liable for debts, including foreign debts, but he may discharge himself by saying he has handed over the fund to somebody competent and bound to administer it in a proper way.]

(1) 10 Sim. 629. (2) 16 Ch. D. 407; 18 Ch. D. 347.
(3) (1858) 4 Drew. 269, 271, 272.

TOMLIN J.
1927
ACHILLOPOULOS, *In re.*
JOHNSON *v.* MAVROMICHALI.

Yes. The key to the solution, it is submitted, is the legal position and liability of the principal; if that is so, then both as regards debts and the beneficial surplus the attorney-administrator can safely pay over, provided he has paid all foreign debts of which he had notice and issued the necessary advertisements. So far as regards the English debts.

The difficulty here however is that there is only one principal before the Court.

[TOMLIN J. You mean all the heirs ought to have been principals unless you can establish that each heir can act independently.]

The evidence seems to show that by Greek law the "heirs" alone are entitled to collect and give a good receipt for the assets.

[TOMLIN J. It seems to point to joint responsibility. How do you free yourself from liability to third persons? The point had better be considered.]

We could get a fresh grant of attorney for all three defendants.

H. C. Bischoff for the defendants. A fresh power of attorney could be procured, and that seems to be the best course to take.

[His Lordship therefore directed the summons to stand over generally with liberty to apply to restore.]

1928. Jan. 16. *W. Greene K.C.* A fresh grant of attorney has now been obtained by all three defendants. It was found necessary under the Judicature (Consolidation) Act, 1925, s. 160, to join Mr. Wordsworth as a co-plaintiff, and the summons will have to be amended accordingly. The two plaintiffs are therefore attorneys for the three defendant heiresses. The authorities seem to show that where the attorney is the attorney of the legal personal representative under the law of the domicil, the Court can authorize him to pay over to the principal. The question now before the Court is whether when under the law of the domicil there is no legal personal representative in our acceptation of the term, but the rights and obligations of the legal personal

representative are imposed by law on the "heir," the same rule will apply.

TOMLIN J. 1928 ACHILLOPOULOS, *In re.* JOHNSON *v.* MAVROMICHALI.

TOMLIN J. In this case the testator was a Greek national. Apparently early in life he settled in Egypt and having lived to a great age, died a Greek national, but probably domiciled in Egypt. Upon the evidence before me, it appears that under Egyptian law a Greek national domiciled in Egypt is subject to Greek law. It therefore is immaterial whether the domicil was Egyptian; in either alternative the Greek law governs. The testator made a will and codicil under which the three defendants who are named in the summons in its original form are nominated by his will as his "heirs." His widow in fact was also nominated, but she predeceased him, and the effect of the evidence of Professor Streit, one of the experts on Greek law, seems to be that the three defendants to whom I have referred are, under Greek law, to-day the heirs of the deceased, having regard to the form of the will. By the will and codicil there were also named executors, all of whom, except two, are now dead. The surviving executors were not in the first instance made defendants, but have been added by amendment.

The evidence with regard to Greek law is this: that under the law of that country there is no system at all by which somebody is granted a formal position corresponding with executor or administrator in this country; on the contrary, those persons who are the heirs are fixed by law with rights and duties corresponding with the rights and duties of the executor or administrator under English law, including the duty of paying the debts. The heirs have now authorized an application in this country for a grant of administration with the will annexed to the plaintiffs as their attorneys. In the first instance, one only of the defendants was the principal, and Mr. P. M. Johnson, the original plaintiff, was the attorney. As the result of some difficulties which might arise from that position, when the matter first came before me last year, I ordered an adjournment, with the result that now there are two plaintiffs, Mr. Johnson and his partner,

TOMLIN J. 1928 ACHILLOPOULOS, *In re.* JOHNSON *v.* MAVROMICHALI.

Mr. Wordsworth, and there has been a fresh grant to the two plaintiffs as attorneys for all three defendants. So that the position to-day is this: there are in this country administrators with the will annexed, attorneys for principals who, under the law of the domicil, are not executors or administrators in our sense of the term, because the law of the domicil does not recognize such, but persons who are under that law, vested with the same rights and duties as an executor or administrator over here.

I may add it appears that under the Greek law the position of the executor so called is merely one of supervision. It is not very clear what are his precise functions, but having regard to the fact that the executors are parties here and assent to the order, it is immaterial for me to examine their position more closely. I think the only question which arises in this case is this: Whether the persons who are charged with the payment of debts under the law of the domicil, not by virtue of any formal act of probate or grant of administration, but by mere force of law, are in a worse position than the legal personal representative in a case where the law of the domicil recognizes the formal creation of the office of executor. There is no question, I think, but that where a testator domiciled abroad has died, and the executors, under the law of the domicil, have procured a grant in this country by their attorneys for him, the Court is free in proper circumstances to authorize the administrator to hand over the surplus of the assets in this country to the executors of the law of the domicil. The problem raised by this summons is whether there is any distinction between the case where the principal is, under the law of the domicil, an executor, and where the principal under the law of the domicil is not an executor, but only the person who, by virtue of his interest, is charged by the law of the domicil with the duties which, under our law, are imposed on the executor. For my part I can see no distinction at all. It seems to me that all that the Court has to do is to satisfy itself that the principal is the person who under the law of the domicil is bound to perform the functions which are imposed by our law upon an executor

or administrator; in other words, that they are the persons who under the law are responsible for seeing that the debts are paid and that the ultimate surplus gets into the proper hands.

In this case I am satisfied by the evidence to which my attention has been called that the three persons who were made original defendants to the summons are the persons who by the law of the domicil, under the Greek law, are charged with the duty of administering the estate, paying the debts, and seeing that the surplus gets into the proper hands. That being so, I am free, if I see fit, to give to the administrators over here liberty to hand over any surplus to those defendants.

The only other matter is, what is the obligation of the administrator in respect of debts before handing over the surplus? It appears that the administrators have issued the usual statutory advertisements in this country, and have paid all the debts, except possibly some Revenue claim which remains to be settled, and also it appears that they have had no notice of any foreign debts. There is some evidence that there are no foreign debts, but the question is whether, in those circumstances, I ought to give liberty to hand over without making any provision or giving any direction in regard to foreign debts. I think I am free to do so. I take the view that the duty of an attorney-administrator for a foreign principal, who is the executor of the law of the domicil, is that he is to take the necessary steps for ascertaining and paying the English debts or the debts payable in the United Kingdom, but having done that, he is free to hand over the surplus (unless he has notice of some foreign debt) without the necessity of foreign advertisements or taking any active steps abroad to ascertain the position in regard to the debts. He is free to hand over the surplus to his principal—being the executor or person in the position of executor under the law of the domicil—because that person is the person directly responsible for the payment of foreign debts. Therefore, if up to the date of handing over he has no notice of any foreign debts, he is justified in handing over the surplus.

TOMLIN J. 1928 — ACHILLOPOULOS, *In re.* — JOHNSON *v.* MAVROMICHALI.

The order of the Court as finally drawn up was as follows :—

"The application by originating summons, etc., upon reading, etc. . . . . And it appearing that the plaintiff, Percy Marr Johnson, has given by advertisement in the Times newspaper of the 9th February, 1925, and in the London Gazette of the 10th February, 1925, such notice as was specified in s. 29 of the Act 22 & 23 Vict. c. 35 ; and that the plaintiffs as the administrators of the estate of the testator Sophocles Konstantin Achillopoulos, have paid or satisfied all claims in respect of the said testator's estate of which they have notice.

"And it further appearing that the law governing the distribution of the testator's estate is Greek law ; and that under such law there being no office corresponding with the office of executor or administrators under the law of England, the defendants, Aristis Mavromichali, Maria Mpasia, and Helen Theotoki are the persons charged with the duty of paying the debts of the testator, and administering and distributing his estate.

"And it further appearing that the defendants, Petros Kyriacoulis Mavromichali, and Konstantinon (1) D. Kaloglopoulon (1), have under Greek law no right as executors to receive any part of the testator's estate.

"And the defendants, Petros Kyriakoulis Mavromichali, and Konstantinon (1) D. Kaloglopoulon (1), by their counsel consenting to this order.

"This Court doth order that the costs of the plaintiffs and defendants of the said application, be taxed by the Taxing Master as between solicitor and client, including in the costs of the plaintiffs all costs, charges, and expenses properly incurred by the plaintiffs, or either of them in relation to the administration of the testator's estate, and not already paid or allowed. . . . .

"And the plaintiffs are to be at liberty to pay or retain the costs, hereinbefore directed to be taxed, out of the assets of the testator in their hands as such

(1) *Sic.*

administrators as aforesaid; and to pay or transfer to the defendants, Aristis Mavromichali, Maria Mpasia, and Helen Theotoki, the surplus of such assets remaining, after payment or retention of the said costs and payment of any further claims against the testator's estate of which the plaintiffs shall have received notice, prior to such payment or transfer as aforesaid. . . . ."

Solicitors: *Wordsworth, Marr, Johnson & Shaw.*

A. R. T.

CREDITON GAS COMPANY *v.* CREDITON URBAN DISTRICT COUNCIL.

[1927. C. 1894.]

Contract—Construction—Duration—Implication that Contract not intended to be perpetual—Determination by Notice.

In 1906 a company was incorporated by statute to supply gas in a certain area in the place of a limited company, and by s. 7 the statutory company took the benefit of all contracts and engagements of the limited company which had been supplying gas to the defendants, an urban council, for public lighting. In 1909 the company entered into an agreement under seal with the council in which it was recited that before the passing of the Act "it was agreed by and between the predecessors of the gas company and the council that the agreement then in force for public lighting should continue to remain in force and be binding on both parties until the council should determine the same" and that "it has been deemed desirable by the said parties hereto that the terms of the said agreement for the public lighting shall be set out as hereinafter mentioned." By the operative part of the agreement the company agreed to light all the public lamps within the district "from and after the first day in September in every year up to the following first day of May inclusive" on certain terms; and provisions were made for increasing the number of lamps. There was no provision as to the period for which the agreement was to run or giving either party a right to determine it. By a supplemental agreement dated June 30, 1921, the times of lighting and the charges were varied, and clause 1 (*c*) provided that new lanterns supplied by the company should become the property of the council without payment after fifteen years if the agreements continued for so long, "and if the said agreements be determined before the expiration of such period" the council were to pay for them.

C. A.

1928

CREDITON GAS CO. v. CREDITON URBAN COUNCIL.

On April 30, 1927, the council gave notice to determine the agreement on August 31, 1927:—

Held, by the Court of Appeal, that having regard to the recitals in the original agreement and clause 1 (*c*) of the supplementary agreement and to the nature of the contracts they were determinable by notice.

Llanelly Railway and Dock Co. v. *London and North Western Ry. Co.* (1873) L. R. 8 Ch. 942; (1875) L. R. 7 H. L. 550 distinguished.

The decision of Russell J., ante, p. 174, affirmed.

APPEAL from a decision of Russell J. (1)

The Crediton Gas and Coke Company was a partnership formed in 1843 to supply the parish and neighbourhood of Crediton with gas. In October, 1905, the Crediton Gas Company, Ld., was registered under the Companies Acts to acquire and carry on the business of the Crediton Gas and Coke Company.

By the Crediton Gas Act, 1906 (6 Edw. 7, c. clxiv.), the limited company was dissolved and its members were united into a company incorporated by the name of The Crediton Gas Company as a body corporate with perpetual succession and a common seal. Sect. 2 of the Act provided that certain statutes, including the Gasworks Clauses Act, 1847 (except ss. 31 to 34), and the Gasworks Clauses Act, 1871, were "subject to the provisions of this Act incorporated with and form part of this Act." Sect. 4 defined the limits of the Act, which included the parish and urban district of Crediton. By s. 7 the statutory company (being the present plaintiffs) took over all the property of the limited company and the benefit of all contracts and engagements entered into by and on behalf of the limited company.

Up to the time of the incorporation of the plaintiff company, the contract for the supply of gas to the defendants for public lighting purposes had never been reduced into writing, but the plaintiffs continued to supply the defendants with gas in accordance with the previous agreement. In 1909 the Government auditor insisted that there should be an agreement under seal for the public lighting, and an agreement under seal, dated March 30, 1909, was accordingly entered into between the plaintiffs and the defendants.

(1) Ante, p. 174.

In this agreement it was recited that the plaintiffs were incorporated under the Crediton Gas Act, and the recitals then continued: "And whereas prior to the passing of the said Act it was agreed by and between the predecessors of the gas company and the Council that the agreement then in force for the public lighting of the District of the Council should continue to remain in force and be binding on both parties until the Council should determine the same And whereas it has been deemed desirable by the said parties hereto that the terms of the said agreement for the public lighting shall be set out as hereinafter mentioned." The main provisions of the agreement were as follows. Clause 2 provided "that the gas company shall from and after the 1st day of September in every year up to the following 1st day of May inclusive (except as hereinafter mentioned) light all the public lamps at dusk and shall extinguish the said lamps not earlier than at 11 o'clock in the night" except that on six nights before the full moon, on the night of the full moon and on the night after the full moon the lamps need not be lighted, and "that the Council shall pay to the gas company therefor at the rate of 28*s.* a lamp." Clauses 3, 4 and 5 enabled the Council to vary the times of lighting and fixed the extra payments to be made in these cases. Clause 6 provided that the gas company should do all necessary works in the way of excavation in carrying gas mains and fixing lamps and should provide at their own expense new lantern heads and burners. By clause 7 the council were to provide and fix at their own cost all new lamp posts and service pipes for the same. The agreement contained no provision as to determining it.

On June 30, 1921, a supplemental agreement was entered into between the plaintiffs and the defendants by which a new clause was substituted for clause 2 of the original agreement varying the hour of extinguishing the lamps and the rate of payment. Clause 1 (*c*) provided that new lanterns supplied by the plaintiffs should become the property of the defendants without payment therefor at the expiration of fifteen years from the date of that agreement "if the

C. A. 1928

CREDITON GAS CO. v. CREDITON URBAN COUNCIL.

principal agreement as varied by this agreement shall continue for so long a period, but if the said agreements be determined before the expiration of such period then and in that case the Council shall purchase the said lanterns at such a price as failing agreement shall be determined by arbitration." The other rates of payment were varied in subsequent clauses.

On April 30, 1927, the council served a notice on the gas company "to determine their agreement with you for the public lighting of their district on August 31, 1927." The plaintiffs then brought this action claiming a declaration that the notice was of no effect and inoperative and an injunction to restrain the defendants from acting upon it.

Russell J. held that the nature of the contract induced an implication that either party could terminate it by notice, and dismissed the action with costs.

The plaintiffs appealed. The appeal was heard on March 8 and 9, 1928.

Grant K.C. and *D. D. Robertson* for the appellants. Before the incorporation of the gas company by statute the limited company, and before that the partnership, were perfectly free to refuse to supply the defendants with gas. The position was entirely altered when the Crediton Gas Act, 1906, was passed. Sect. 2 of that Act incorporated, amongst other Acts, the Gasworks Clauses Act, 1871, and the latter Act imposed statutory duties on the plaintiffs. By s. 11 they were required to supply every private consumer within 25 yards of their mains, and by s. 24 they were required to supply gas to any public lamps within 50 yards of their mains in such quantities as the local authority of each district within the limits of the special Act "may from time to time require to be supplied." Sect. 36 imposed penalties for any failure to fulfil a statutory duty. Further, the plaintiffs became entitled by virtue of s. 7 of the special Act to the benefit of all contracts and engagements entered into by and on behalf of the limited company. The defendants, on their side, were empowered by the Public Health Act, 1875, s. 161, to contract for the supply of gas or other means of lighting

the streets, and they could only supply gas themselves so long as there was no company authorized by Parliament to supply gas that was supplying gas in their district.

It is important to keep in mind that this was the position of the parties when the agreement of March 30, 1909, was entered into, and there is nothing in that agreement to suggest that it was not permanent or to impose any limit of time. It was an agreement providing for the lighting of existing public lamps and making provision for future developments of the district. So, too, the supplementary agreement of June 30, 1921, imposes no limit of time. In those circumstances, and having regard to the fact that there was a statutory obligation on the plaintiffs to supply gas to the defendants and on the defendants to obtain gas for public lighting from no one else, the principles of *Llanelly Railway and Dock Co.* v. *London and North Western Ry. Co.* (1), as enunciated by James L.J. in the Court of Appeal and Lord Selborne in the House of Lords, apply.

[SARGANT L.J. Is not the only obligation of the defendants to pay for the gas consumed, so that if they do not require any they need not take it? see *Metropolitan Electric Supply Co.* v. *Ginder*. (2)]

This agreement goes further than that. It is referred to in the recitals as an agreement for public lighting, and clause 2 imposes an obligation to light all gas lamps at dusk. That applies not only to the existing lamps but to any new lamps erected. Under the agreement the plaintiffs have to supply the lanterns at their own expense, and that contemplates a continuation of the lighting with gas so as to recoup them.

[LORD HANWORTH M.R. Any hardship in that respect if the agreement was determined is met by clause 1 (*c*) of the supplementary agreement.]

That is so in regard to the lanterns, but not as to the expense of the necessary excavations which clause 6 of the original agreement compels the plaintiffs to do. It may well be that even if the defendants ceased to take gas, they would continue liable to pay under the agreement: *Leiston*

(1) L. R. 8 Ch. 942, 949; L. R. 7 H. L. 550, 567. (2) [1901] 2 Ch. 799.

C. A. 1928

CREDITON GAS CO. v. CREDITON URBAN COUNCIL.

Gas Co. v. *Leiston-cum-Sizewell Urban Council.* (1) Further, although in the recitals to the agreement of March 30, 1909, reference is made to an earlier agreement for public lighting between the plaintiffs' predecessors and the defendants that was determinable by the defendants, and the next recital states that it is deemed desirable that the terms of the said agreement for the public lighting "shall be set out as hereinafter mentioned," in fact the agreement set out contains no power to determine, and the Court cannot imply a right to determine from these recitals. Further, as the previous agreement was not under seal it was irregular so far as the plaintiffs were concerned and must be disregarded. Again, the reference in clause 1 (*c*) of the supplementary agreement to the chance of the agreements being determined is sufficiently explained as a reference to determination by mutual agreement. This case is therefore directly covered by *Llanelly Railway and Dock Co.* v. *London and North Western Ry. Co.* (2)

Spens K.C. and *Buckmaster* for the respondents. The recital of the earlier agreement cannot be ignored. Although not under seal, the defendants could pay for work done under it: *Brooks, Jenkins & Co.* v. *Torquay Corporation* (3); *Young & Co.* v. *Royal Leamington Spa Corporation.* (4) And what the defendants were doing was to confirm under seal that agreement, so as to comply with s. 174 of the Public Health Act, 1875. As the verbal agreement was terminable by the defendants by notice, the same must be true as to the confirmatory agreement under seal. But in any case a right to determine can be implied from the recitals. Even apart from the recitals, this contract is of a nature which prevents *Llanelly Railway and Dock Co.* v. *London and North Western Ry. Co.* (2) applying. That case relates to a grant of running powers to a railway, a very different subject-matter from that of the sale of gas, as Russell J. pointed out in his judgment. Also, there was here no consideration for a new permanent agreement. It is not a case like *Leiston Gas Co.* v. *Leiston-cum-Sizewell Urban Council* (1), where new materials were

(1) [1916] 2 K. B. 428.
(2) L. R. 8 Ch. 942; L. R. 7 H. L. 550.
(3) [1902] 1 K. B. 601, 607.
(4) (1883) 8 App. Cas. 517, 527.

supplied. The fact that the plaintiffs are a statutory company is immaterial. The statute placed them under an obligation to supply gas, but not on the defendants to take it.

Grant K.C. in reply. A contract not under seal is invalid under the Public Health Act, 1875, s. 174, if it be entered into by an urban council for a sum exceeding 50*l*. Therefore, the recital of such a contract is a recital of something which has ceased to have any existence as a contract. It can therefore be ignored. But even if that were not so, it would not import anything into the operative part which is clear and unambiguous. Further, this is not a case of an ordinary commercial transaction. Gas is a matter which has been the subject of special legislation, just as railways have.

LORD HANWORTH M.R. This is an appeal from a decision of Russell J., and the question for determination is whether he was right in the decision he gave on the construction of an agreement. The agreement was one by which the plaintiffs undertook to supply the defendants with gas for public lighting, and it is said by the plaintiffs that as the agreement contained no provision for determination, it must apparently be regarded as continuing for ever, and the case said to be applicable is *Llanelly Railway and Dock Co.* v. *London and North Western Ry. Co.* (1) Before the agreement was entered into there was a partnership formed for the purpose of supplying Crediton with gas, and until October, 1905, that arrangement continued. In that month a limited company was formed and took over the partnership business, and this arrangement was carried on by that company until the plaintiff company was incorporated by a statute which conferred rights on the plaintiffs and also imposed liabilities. That statute was the Crediton Gas Act, 1906, and by s. 2 it incorporated a number of Acts commonly incorporated in a local and private Act and also the Gasworks Clauses Acts of 1847 and 1871. I pause to consider the position of the plaintiff company at that time. The effect of incorporating the Gasworks Clauses Act, 1871, was to

(1) L. R. 8 Ch. 942; L. R. 7 H. L. 550.

C. A. 1928

CREDITON GAS CO. v. CREDITON URBAN COUNCIL.

Lord Hanworth M.R.

make certain sections apply. Sect. 11 provides: "The Undertakers shall, upon being required so to do by the owner or occupier of any premises situate within 25 yards from any main of the Undertakers, or such other distance as may be prescribed, give and continue to give a supply of gas for such premises. . . . ." And s. 24 provides: "The Undertakers shall supply gas to any public lamps within the distance of 50 yards from any of the mains of the Undertakers in such quantities as the local authority of each district . . . . within the limits of the special Act may from time to time require to be supplied, and the price to be charged by the Undertakers and to be paid to them for all gas so supplied shall be settled by agreement between the local authorities and the Undertakers, and in case of difference by arbitration. . . . ." And by s. 36 penalties are imposed on the undertakers for failing to supply gas.

It is clear, therefore, that as soon as the Act of 1906 was passed there was a duty imposed on the plaintiffs to supply gas to the defendants, as a local authority within s. 24, and that the duty was to supply so much gas as the defendants should "from time to time require to be supplied." The 1906 Act also provided in s. 7 that the plaintiffs should be entitled to the benefit of all contracts and engagements entered into by or on behalf of the limited company. The result is that from the passing of the Act the plaintiffs had to supply all gas as required by the defendants, and that any agreement entered into by the limited company became binding on the statutory company.

After that the plaintiffs continued to supply gas to the defendants, but it was pointed out to the defendants by their auditors that they were a body to which s. 174 of the Public Health Act, 1875, applied, and that every contract of which the value exceeded 50*l.* ought to be under seal, and therefore that as there was no sealed agreement at that time for the supply of gas, there was no valid and enforceable contract in being between the plaintiffs and the defendants. That section of the Public Health Act must be taken to have the meaning given to it by Walton J. in *Brooks, Jenkins & Co.*

v. *Torquay Corporation* (1), who said: "It was, however, decided in the case of *Bournemouth Commissioners* v. *Watts* (2), and the earlier cases there cited, that where work had been done for a local authority under a contract which was invalid because it was not under seal, it was not ultra vires for the local authority to pay for the work of which they had had the benefit. If under such circumstances it is not ultra vires for the local authority to pay, it cannot be ultra vires for them to bind themselves to pay by an instrument under seal."

An agreement under seal was in fact entered into on March 30, 1909, which was varied by an agreement of June 30, 1921, that was expressed to be supplemental to the original agreement. We have therefore to read the two agreements together for the purpose of construing them. The reason why a difficulty has now arisen between the parties is that on April 30, 1927, the defendants gave notice to determine the agreements on August 31, 1927.

We have not had the question argued whether a four months' notice was sufficient, if notice determining the agreements could be given at all. What the plaintiffs say is that it was impossible for the defendants to determine the agreements, as there was no provision made in the two agreements for their determination, and therefore that the agreements are still binding on the defendants. By the writ in the action the plaintiffs ask for a declaration that the notice of April 30, 1927, was of no effect and inoperative and an injunction to restrain the defendants from acting upon it.

It is said that the defendants were incapable of serving a valid notice to determine the agreements because of the principle laid down in *Llanelly Railway and Dock Co.* v. *London and North Western Ry. Co.* (3) It is said that prima facie a contract which makes no provision for its determination is intended to continue and has no limit of time. In other words, as Lord Selborne said in the case just referred to: "My Lords, an agreement de futuro, extending over a tract of time which, on the face of the instrument, is indefinite

(1) [1902] 1 K. B. 601, 607.
(2) (1884) 14 Q. B. D. 87.
(3) L. R. 8 Ch. 942; L. R. 7 H. L. 550, 567.

C. A. 1928 — CREDITON GAS CO. v. CREDITON URBAN COUNCIL. — Lord Hanworth M.R.

and unlimited, must (in general) throw upon any one alleging that it is not perpetual, the burden of proving that allegation, either from the nature of the subject, or from some rules of law applicable thereto." The rule of law there referred to is that stated in the Court below by James L.J. (1) when, after referring to contracts which are by their nature not intended to be permanent but to be subject to determination and giving as illustrations a contract of partnership, a contract of master and servant, a contract of principal and agent and a contract of employer and employed, he continued: "All these are instances of contracts in which, from the nature of the case, we are obliged to consider that they were intended to be determinable. All the contracts, however, in which this has been held are, as far as I know, contracts which involve more or less of trust and confidence, more or less of delegation of authority, more or less of the necessity of being mutually satisfied with each other's conduct, more or less of personal relations between the parties."

It is argued by the plaintiffs that there is no such relation in regard to these contracts, no relations of a personal nature, and nothing involving trust or confidence. They merely recognize the duty of the plaintiffs to supply gas and impose an obligation on the defendants to take and pay for it. On the other hand, it is not unimportant to examine the nature of the contract under consideration in *Llanelly Railway and Dock Co.* v. *London and North Western Ry. Co.* (2) The facts there were that the London and North Western Railway Company wanted to obtain access for their own lines to Swansea, and could have done this by obtaining statutory powers and laying the necessary lines. They found, however, that the Llanelly Railway and Dock Company had access to Swansea, which could be conveniently used by them, whilst the Llanelly Railway and Dock Company was in need of money. The result was that the parties came together, and that the London and North Western Railway Company agreed to lend 40,000*l.* to the Llanelly Company and in return received from the Llanelly Company running powers over

(1) L. R. 8 Ch. 942, 950. (2) L. R. 8 Ch. 942; L. R. 7 H. L. 550, 567.

their lines so as to give access to Swansea. There appears to be nothing in the nature of the contract in that case to make a right to determine necessary, and James L.J. said: "But I am of opinion that no such consideration applies to a case in which there is a grant, or an agreement in the nature of a grant, of a wayleave, or of running powers, which is only another mode, according to my view of it, of expressing a wayleave. In my view the implication is quite the reverse." It is plain that the London and North Western Railway Company could not be expected to come to the relief of the Llanelly Company unless it secured permanently for themselves running powers over the Llanelly Company's line.

But how far does that apply to the present case? I asked Mr. Grant how far there was an obligation on the defendants to take the plaintiffs' gas, and he had to admit that in view of s. 24 of the Gasworks Clauses Act, 1871, the obligation on the defendants was to take such an amount (if any) as they might from time to time require to be supplied. If therefore the defendants had determined to keep their lamps unlit and said that they did not wish to be supplied with gas for them, no complaint could have been made by the plaintiffs; and so, by degrees, the number of lights might have been decreased. Even therefore if the agreements were perpetual as regards the gas required by the plaintiffs, the damages for a breach must be very small in amount, for the defendants had it in their own hands to determine what lighting should be used and for how many lamps.

It follows that per se the contracts here are not of the same character as in *Llanelly Railway and Dock Co.* v. *London and North Western Ry. Co.* (1) But even so, Mr. Grant is right in saying that we must find from the contracts themselves that from the nature of their subject-matter or some rule of law these contracts were not intended to last for ever. I therefore turn to the two contracts. It is recited in the first contract as follows: "Whereas prior to the passing of the said Acts it was agreed by and between the predecessors of the gas company and the Council that the agreement then in force

(1) L. R. 8 Ch. 942; L. R. 7 H. L. 550.

C. A. 1928 — CREDITON GAS CO. v. CREDITON URBAN COUNCIL. — Lord Hanworth M.R.

for the public lighting of the District of the Council should continue to remain in force and be binding on both parties until the Council should determine the same And whereas it has been deemed desirable by the said parties hereto that the terms of the said Agreement for the public lighting shall be set out as hereinafter mentioned." Some light was thrown on the purpose of the agreements when regard was had to these recitals. The way in which Mr. Grant seeks to escape from these recitals is by saying that the prior agreement was irregular and not under seal and therefore that no regard must be had to the prior relations of the parties. That is not in my view a sufficient answer.

We have to have regard to the nature of the contract, and it is that gas shall be supplied at the instance and according to the demands of the defendants, who are made the determiners of how much they will have. It is difficult therefore to say that the defendants had to require the full amount of gas which was being used in 1906 when the statutory company was incorporated, and it seems to me that this is not the effect of the contract entered into. When the terms of the contracts are looked at, it is plain that the right to have more or less lamps lighted is reserved, and the plaintiffs agree to supply gas in the places desired by the defendants. Again, when the supplementary agreement is looked at, it is seen that there is a provision which definitely contemplates the determination of the agreement. The purpose of that agreement is to vary the first agreement, as appears from clause 1, which replaces by a new agreement as to lighting clause 2 of the old agreement. And clause 2 (*c*) provides: "The said new lanterns shall become the property of the Council without payment therefor at the expiration of 15 years from the date of this agreement if the principal agreement as varied by this agreement shall continue for so long a period, but if the said agreements be determined before the expiration of such period then and in that case the Council shall purchase the said lanterns at such a price as failing agreement shall be determined by arbitration. . . . ." We are to read the first agreement as if clause 2 were

cancelled and a clause which includes the clause I have just read were introduced into it.

It appears to me therefore that there are clear indications that it was contemplated that the agreement should be subject to determination. Having regard therefore to the nature of the contract and the actual terms of the two recitals and clause 2 (*c*) of the supplementary agreement, I come to the conclusion that this is a wholly different case from *Llanelly Railway and Dock Co.* v. *London and North Western Ry. Co.* (1), and that the contract effected by the two agreements cannot be said to be binding for ever.

I think therefore that Russell J. was quite right to dismiss the action and to say that the plaintiffs were not entitled to any relief. The appeal must be dismissed with costs.

SARGANT L.J. I am of the same opinion. The plaintiffs brought this action for a declaration that the notice to terminate of April 30, 1927, was of no effect and inoperative. But they did not allege that it was inoperative by reason of insufficient length of notice. Their claim is that the agreements in question were perpetual and incapable of being determined by the defendants.

For the purpose of dealing with that question, the first thing to be looked at is the contract itself and any circumstances existing at the date it was entered into. On March 30, 1909, the parties were in this relative position. The plaintiffs, as a statutory company, had to supply gas in accordance with the private Act and the Gasworks Clauses Act, 1871, which is incorporated in the private Act, and they were a new company formed on the dissolution of a previously existing limited company which had, in its turn, taken over the business of a previously existing partnership.

Under the terms of the Act the engagements already binding the limited company towards other persons were made binding on the new statutory company, and the statutory company was by virtue of s. 24 of the Gasworks Clauses

(1) L. R. 8 Ch. 942; L. R. 7 H. L. 550.

C. A. 1928 — CREDITON GAS CO. v. CREDITON URBAN COUNCIL. — Sargant L.J.

Act, 1871, bound to supply the defendants with as much gas as they might from time to time require. The plaintiffs were in the ordinary position of a gas company with special powers and under an obligation within their area to supply gas to ordinary customers and to the defendants. They were bound to supply, but the customers were not bound to take gas. The defendants could require so much as they wanted. There was accordingly a unilateral obligation only. In that state of things the agreement of March 30, 1909, was entered into in which it was recited that before the passing of the private Act it was agreed between the predecessors of the plaintiffs and the defendants that the agreement then in force for public lighting "should continue to remain in force and be binding on both parties until the Council should determine the same"; and it was then recited that "it has been deemed desirable by the said parties hereto that the terms of the said agreement for the public lighting shall be set out as hereinafter mentioned." We have not therefore to deal with a definite cancellation of the existing agreement and the substitution of another. The intention seems to have been to state in writing and under seal what were the existing obligations of the parties to the old contract. Further, there is in the contract under seal no creation of any obligation on the defendants to take gas from the plaintiffs. The agreement clearly assumes the continuance of the relations already existing between the parties, the right of the local authority to demand gas and the obligation of the company to supply it when demanded. As I read the stipulations of this agreement they are stipulations as to price and as to the manner in which the requirements of the defendants are to be satisfied from time to time by the plaintiffs. It is suggested by the plaintiffs that the effect of the agreement was to change completely and radically the relationship between the parties, and to substitute for the position under which the defendants could require so much gas as they thought fit one under which the defendants were binding themselves for ever to take a definite supply of gas from the plaintiffs. To my mind this would be to

give to the agreement a meaning inconsistent with the recitals in it and the details of the clauses in the operative part.

If any further confirmation were required of that view, it is to be found in the supplemental agreement of June 30, 1921, because in clause 1 (*c*) of that agreement there is, as it appears to me, a definite recognition of the position that the agreement is determinable. It was suggested that clause 1 (*c*) referred only to the possibility of a determination by mutual agreement, but that is not to my mind a possible view. Clause 1 (*c*) is providing for what is to take place if the contract is determined, and that would be unnecessary if it could only be determined by agreement, for the agreement for determination would naturally include all necessary terms. Clause 1 (*c*) is, in my opinion, entirely consistent with the view I have already expressed.

Reference has been made to *Llanelly Railway and Dock Co.* v. *London and North Western Ry. Co.* (1), but to my mind the circumstances of that case were so entirely different that it can be no authority for the determination of this case. Moreover, James L.J., in stating the law in the Court of Appeal, said: "I start with this proposition, that prima facie every contract is permanent and irrevocable, and that it lies upon a person who says that it is revocable or determinable to shew either some expression in the contract itself, or something in the nature of the contract, from which it is reasonably to be implied that it was not intended to be permanent and perpetual, but was to be in some way or other subject to determination." To my mind that implication is amply supplied in this case when regard is had to the fact that the defendants were under no obligation at all to take gas, but were free to take such gas as they might require. That circumstance and the recitals in the agreement and the nature of its terms, dealing, as I think, with details and not affecting the general relation of the parties, supply ample reason for coming to the conclusion that the only matter being dealt with is the method in which the supply of such gas as might be required by the defendants should be given

(1) L. R. 8 Ch. 942, 949; L. R. 7 H. L. 550.

C. A. 1928

CREDITON GAS CO. v. CREDITON URBAN COUNCIL.

Sargant L.J.

and paid for. That being so, it seems to me that the defendants, being desirous of obtaining a supply of light from another source, were entitled to notify the plaintiffs that they did not require to take gas under the terms of the agreement. That seems to me to have been the effect of the defendants' notice, and that in my opinion is what they were entitled to do. I agree, therefore, that the appeal must be dismissed.

LAWRENCE L.J. I agree, and will only add a few words. In arriving at the meaning of the agreement of March 30, 1909, I think it is important to bear in mind the circumstances in which it was executed. Before the incorporation of the plaintiffs as a statutory company their predecessors, who were a limited company, had supplied gas to the defendants under a verbal agreement which was to remain in force until it was determined by the defendants. After the passing of the private Act the parties acted on this agreement and continued on the old footing until 1909, when the Government auditor insisted that in order to regularise the payments which the defendants were making to the plaintiffs there should be an agreement under seal recording the terms on which the gas was being supplied. Accordingly the defendants prepared a draft agreement and sent it to the plaintiffs with a covering letter informing them of the auditor's requirement and requesting them to enter into an agreement in the terms suggested. The plaintiffs acceded to that request, and in the result the agreement of March 30, 1909, was executed. Turning to the agreement, the genesis of which I have shortly described, I find that it contains a recital of the arrangement which the plaintiffs' predecessors and the defendants had come to before the passing of the special Act. The recital is in these terms: "Whereas prior to the passing of the said Act it was agreed by and between the predecessors of the gas company and the Council that the agreement then in force for the public lighting of the District of the Council should continue to remain in force and be binding on both parties until the Council should determine the same." And then

the agreement goes on to recite that "it has been deemed desirable by the said parties hereto that the terms of the said agreement for the public lighting shall be set out as hereinafter mentioned."

The agreement then provides for the lighting and extinguishing of gas lamps and for payment for each lamp and also provides for the plaintiffs furnishing new lamps.

There is not a word in the agreement as to the supply of gas nor does the agreement oblige the defendants to take any special quantity of gas. Quite apart from the inherent improbability of the defendants putting forward an agreement which would operate to bind them in perpetuity to take from the plaintiffs a fixed quantity of gas at a fixed price, I am of opinion, regard being had to the circumstances and to the terms of the agreement itself, that its sole object was to set out the terms and conditions regulating the supply of gas so long as the relationship of customer and supplier existed, and that it was in no sense intended to regulate the duration of that relationship, which was left to stand on the old footing—namely, that it was for the defendants to say when they no longer required to be supplied. Had it been intended to bring about such a drastic departure from the existing relationship of the parties as is now suggested by the plaintiffs, it is inconceivable to my mind that the agreement should have recited the old arrangement and then have failed to negative the existence of any right of determination on the part of the defendants. If that had been the intention, I should have expected to find an express provision that the defendants should take gas from the plaintiffs in perpetuity and not have the right to determine the supply.

This view is amply fortified by clause 1 (*c*) of the supplemental agreement, which, when dealing with the ownership of new lanterns supplied by the plaintiffs, recognizes incidentally that the agreement may come to an end at any moment. The case which was cited to us in argument is in my opinion distinguishable for the reasons stated by my Lords.

C. A. 1928 — CREDITON GAS CO. v. CREDITON URBAN COUNCIL.

In my view therefore Russell J. came to the right conclusion, and this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *R. W. Cooper & Sons; Guscotte, Wadham, Tickell & Co., for John Symes, Crediton.*

H. C. G.

Distinguished. *Re* WIGHTWICK'S WILL TRUSTS. [1950] 1 All E.R. 689.

Distinguished. *In re* WIGHTWICK'S WILL TRUSTS [1950] 1 Ch. 260
Applied. *In re* CHAMBERS' WILL TRUSTS [1950] 1 Ch. 267

ROMER J. 1927 — *Oct.* 28; *Nov.* 2, 16.

In re CHARDON.

JOHNSTON *v.* DAVIES.

[1927. C. 1723.]

Will—Cemetery—Gift for Maintenance of Graves—Validity—Alienation, Rule against Restraint of—Perpetuities, Rule against.

By his will a testator gave a sum of 200*l.* to his trustees upon trust to invest it and to pay the income thereof to a cemetery company "during such period as they shall continue to maintain and keep" two specified graves "in the said cemetery in good order and condition with flowers and plants thereon as the same have hitherto been kept by me," and he declared that, if the graves should not be kept in such order and condition, his trustees should pay and apply the income in manner therein mentioned:—

Held, that the gift did not infringe the rule against perpetuities or the rule against inalienability and was a valid gift.

In re Gage [1898] 1 Ch. 498 referred to.

ADJOURNED SUMMONS.

The testator, Francis Edouard Chardon, by clause 8 of his will, dated February 28, 1923, directed as follows: "I give unto my trustees the sum of two hundred pounds free of duty upon trust to invest the same upon any of the investments hereinafter authorised and pay the income thereof to the South Metropolitan Cemetery Company West Norwood during such period as they shall continue to maintain and keep the graves of my great grandfather and the said Priscilla Navone in the said Cemetery in good order and condition with flowers and plants thereon as the same have hitherto been kept by me." The clause further provided that if the graves should not be kept in the order and condition thereinbefore

specified, the trustees should pay and apply the said income under the subsequent clause in the will relating to the residuary estate of the testator.

The testator died on December 22, 1925.

This summons was taken out by the trustees of his will for the determination of the question (inter alia) whether the trust contained in clause 8 of the will was valid or whether it was void for perpetuity or otherwise.

Farwell K.C. and *Colquhoun Dill* for the plaintiffs. This is a case where an attempt has been made to make property inalienable. On that ground the gift is bad as pointing to a perpetuity: see *Carne* v. *Long* (1); *In re Swain.* (2) If the effect of the present provision is to place the fund in the hands of the trustees and their successors so that it cannot be dealt with by the company or any one else, that is an illegal provision and unenforceable: *Cocks* v. *Manners* (3); *In re Dutton.* (4) A gift to an institution which prevents that institution from taking the capital sum is a void gift, as the capital sum is thus being made inalienable for an indefinite period. The present condition is a condition relating to a period which begins with each year. If at the end of any year the trustees come to the conclusion that the graves are not being kept in a proper condition, the gift over comes into operation. This is a series of contingent gifts: see also *In re Cassel.* (5)

B. A. Hall for a beneficiary.

Stafford Crossman for the Crown. This is not an interest which is capable of vesting. Owing to this interest being an interest unknown to the law, because it does not vest within the period, there is nothing to vest, and it is unnecessary to say that it is void as infringing the rule against perpetuities. No interest can vest unless it is an interest known to the law. As to *In re Cassel* (5) the dictum of Russell J. in that case does not qualify anything as regards vesting. This interest

(1) (1860) 2 D. F. & J. 75.
(2) (1908) 99 L. T. 604.
(3) (1871) L. R. 12 Eq. 574, 585.
(4) (1878) 4 Ex. D. 54.
(5) [1926] Ch. 358, 368.

ROMER J. 1927 CHARDON, *In re.* JOHNSTON *v.* DAVIES.

is an indeterminate interest which does not vest within the rules and is void.

[He referred to *Wainwright* v. *Miller* (1); Lewis on Perpetuity, p. 173, para. 8; Gray on The Rule against Perpetuities, p. 207, para. 232; p. 587, para. 789.]

D. D. Robertson for the company. This provision is a limitation and not a condition precedent. If it is a limitation, it is a limitation known to the law and the vesting takes place at once. No question of perpetuities can arise: *In re Moore.* (2)

Stamp for the official trustee of charity lands. There is a considerable legal difference between land and personalty. As to land, every legal interest vests immediately in the person entitled. The person who takes in possession immediately assumes possession of the land itself. Assuming fand to be in the position of personalty, if it is cut up it must be vested in trustees and the beneficiaries are deprived of the land. Trusts of this kind are not good. Land could not be limited to persons for 1000 or 2000 years on trust to manage it and then to allow other people to benefit. As to personalty limited to persons in succession the investment must necessarily be separated from the enjoyment of the property. With regard to personal estate the whole of the property must vest within a life or lives in being and twenty-one years afterwards. *Wainwright* v. *Miller* (1) was applied to personalty in *In re Gage.* (3) No case has ever been put forward suggesting that property could be tied up in trustees, apart from charities, for more than a life or lives in being and twenty-one years afterwards. If property is vested in trustees beyond the perpetuity limit the vesting of an integral part of the fund is postponed. Control of personalty is such a vital part of it that, unless the control passes to the beneficiaries within the period of the rule, a breach of the rule is committed. A trust which will prevent this is a trust obnoxious to the rule. *Wainwright* v. *Miller* (1) and the cases which follow that case are the only cases where

(1) [1897] 2 Ch. 255. (2) (1888) 39 Ch. D. 116, 130.
(3) [1898] 1 Ch. 498.

the exceptions have been discussed. It must be admitted that *In re Gage* (1) would provide an exception.

Stafford Crossman in reply. In *In re Parker* (2) and other cases of that kind the gift over falls into residue.

ROMER J. This is a very interesting, and, I think, very difficult case to determine, but as I have formed a definite opinion as to the right answer to be given to the question I do not think there would be any advantage in my considering the matter further.

The gift with which I have to deal is in these terms: "I give unto my trustees the sum of two hundred pounds free of duty upon trust to invest the same upon any of the investments hereinafter authorised and pay the income thereof to the South Metropolitan Cemetery Company West Norwood during such period as they shall continue to maintain and keep the graves of my great grandfather and the said Priscilla Navone in the said Cemetery in good order and condition with flowers and plants thereon as the same have hitherto been kept by me." It is argued that that is a void gift, and on reading it the mind is naturally directed to the cases in which it has been established over and over again that a trust to keep in repair a tomb not in a church is invalid, either because it offends the rule against perpetuities, the beneficial interest not necessarily vesting in a life in being and twenty-one years; or because the beneficial interest never vests in any one at all. One is therefore inclined at first sight to come, I think too hastily, to the conclusion that any trust not being a charitable trust which may go on, as this one may go on, indefinitely beyond lives in being and twenty-one years is invalid. But then when the matter is considered a little more closely this question presents itself: If this be a bad gift it must be because there is some principle of law or equity that makes it bad. Now there is a rule to the effect that vested interests in property cannot be rendered inalienable. But the interest of the cemetery company under the gift in question is

(1) [1898] 1 Ch. 498. (2) (1880) 16 Ch. D. 44.

ROMER J. 1927 CHARDON, *In re.* JOHNSTON *v.* DAVIES.

certainly not inalienable; they could dispose of it, if they could find a purchaser, to-morrow. There is also the well known rule against perpetuities which is quite a different rule from that against inalienability, and that rule is that the vesting of property real or personal (and it also applies to interests legal or equitable) cannot be postponed beyond lives in being and twenty-one years. This gift does not appear to offend against that rule. The interest of the cemetery company, such as it is, vests at once. It has been pointed out on more than one occasion, perhaps it was last pointed out in the case to which my attention was called of *Wainwright* v. *Miller* (1), that the rule against perpetuities is not dealing with the duration of interests but with their commencement, and so long as the interest vests within lives in being and twenty-one years it does not matter how long that interest lasts. This is pointed out by Mr. Gray in his book, and if it were not the case, the limitation of a fee simple would offend the rule against perpetuities. It is well known that in many settlements the limitations continue long beyond the lives in being and twenty-one years. I cannot see therefore that this gift offends against the rule against perpetuities, as I understand that rule.

Then the case was put in two different ways, first by Mr. Crossman and then by Mr. Stamp. Mr. Crossman said, Never mind about the rule against perpetuities or the rule against inalienability, this is an interest in personal estate which is unknown to the law. At first he was inclined to contend that the only interests which could be given by way of trusts in personalty were interests for lives and absolute interests. However, I then suggested to him that a trust to pay the income of a fund to A. and his executors administrators and assigns for ten years would not be bad. He assented. Then I asked him what the position would be if the trust was to pay the income to the person his executors administrators and assigns for twenty-two years. That, Mr. Crossman said, would be bad, because it would offend against the rule against perpetuities. But for the reasons

(1) [1897] 2 Ch. 255.

I have already given this is not the case. In my opinion that rule does not render invalid a trust to pay the income of a fund to A. his executors administrators and assigns for twenty-two years. Before I deal with Mr. Stamp's point I had better perhaps mention this. It is admitted by Mr. Crossman that a trust to pay the income to A. his executors administrators and assigns indefinitely, that is to say for ever, would be a good trust, because it would be equivalent to giving an absolute interest, and so it would, but he says that a trust to pay the income to A. for an indefinite period, that is to say until the happening of an event that may never happen, is bad, because that is not equivalent to an absolute interest. While it is true that it is not equivalent to an absolute interest it is very much like, and analogous to, a determinable fee in real estate. Where land was limited to A. and his heirs until a certain event should happen, a determinable fee was created, though the question whether since the statute Quia Emptores a determinable fee can be created is a matter upon which lawyers are not agreed. But if the determinable fee in real estate can no longer be created it is because of the statute of Quia Emptores, and most assuredly the statute of Quia Emptores had nothing to do with personal estate. I therefore do not know any reason why a trust to pay the income indefinitely to a certain person his executors administrators and assigns until a certain event happens should be bad unless it be for the reason advanced by Mr. Stamp.

Now Mr. Stamp's contention was this. He said, and truly, that there are fundamental differences between real and personal estate, and he said that there is a rule which appears to me, if it be a rule, to be one that is distinct from the rules against inalienability and perpetuity, by virtue of which it is impossible to separate the legal from the equitable interest in personal estate for a longer period than a life in being and twenty-one years. Now it is agreed that there is no authority for the proposition so stated; indeed, what authority there is is against it, because in the case of

ROMER J. 1927 CHARDON, *In re.* JOHNSTON *v.* DAVIES.

In re Gage (1) it appears to have been held by Kekewich J. that a trust to pay the income to an unborn person for life was a good trust; it certainly did not offend the rule against perpetuities, because the equitable interest vested in a life in being and twenty-one years, but it was a trust that might last beyond the perpetuity rule. Kekewich J. did not seem to find any difficulty in that case in allowing a separation of the legal interest in the fund from the equitable interest in the fund for more than a life in being and twenty-one years. Mr. Stamp says that that is an exception from the rule. But he has not called my attention to any text-book or authority in which the rule itself is stated, and for myself I do not think that any such rule exists. The cemetery company and the persons interested in the legacy, subject to the interest of the cemetery company, could combine to-morrow and dispose of the whole legacy. The trust does not, therefore, offend the rule against inalienability. The interest of the cemetery company is a vested interest; the interests of the residuary legatee, it being agreed on all hands that, subject to the interest of the cemetery company, the legacy falls into residue, are also vested. All the interests therefore created in this 200*l.*, legal and equitable, are vested interests and, that being so, the trusts do not offend the rule against perpetuity. I know of no other rule which will enable me to come to the conclusion that this is an invalid gift.

Solicitors: *Theodore Goddard & Co., for Chamberlain, Johnson & Parke, Llandudno; The Treasury Solicitor; Devonshire, Wreford Brown, & Co.*

(1) [1898] 1 Ch. 498.

J. L. D.

In re VILLAR.

PUBLIC TRUSTEE *v.* VILLAR.

[1927. V. 858.]

ASTBURY J.

1928

April 17, 18.

Will—Uncertainty—Perpetuity—Property tied up during numerous Lives and twenty Years after—Queen Victoria's Descendants living on September 6, 1926—Common Form—Future Difficulty and Expense of ascertaining Date of Survivor's Death—Practicability—Validity.

By his will dated June 14, 1921, and confirmed by a codicil of February 2, 1926, a testator who died on September 6, 1926, gave his property to his trustees upon certain trusts as to income and capital for his participating issue as therein defined, using a well known common form so as to tie it up in such a way that the capital was not to vest until the expiration of "the period ending at the expiration of 20 years from the day of the death of the last survivor of all the lineal descendants of Her Late Majesty Queen Victoria who shall be living at the time of my death":—

Held, that though the existing lives selected were very numerous and it would be extremely difficult and expensive in the future to ascertain the date of the survivor's death, it could not be said to be so impracticable or beyond the scope of the ordinary legal testimony probably then available as to avoid the trust ab initio for uncertainty or perpetuity. The trust was therefore valid.

Thellusson v. *Woodford* (1805) 11 Ves. 112 explained and applied.

ORIGINATING SUMMONS.

By his will dated June 14, 1921, a testator appointed the Public Trustee and the testator's adult sons ordinarily resident in England, his executors and trustees.

He defined the meaning of certain expressions used in his will as follows:—

"'The period of restriction' shall mean the period ending at the expiration of 20 years from the day of the death of the last survivor of all the lineal descendants of Her Late Majesty Queen Victoria who shall be living at the time of my death."

"'Participating issue' shall mean all my issue for the time being living who shall not have any ancestor (being issue of mine) living." A beneficiary forfeited his interest in income on bankruptcy or alienation.

ASTBURY J. 1928 VILLAR, *In re.* PUBLIC TRUSTEE *v.* VILLAR.

After certain specific gifts he devised and bequeathed all his property to his trustees upon trust out of the income to pay expenses of management and insurance and to pay his wife an annuity of 1000*l.* a year during widowhood and a life annuity of 500*l.* a year on remarriage, each annuity being free of all deductions (including income tax).

Subject thereto and to the provisions thereinafter contained the trustees were during the period of restriction to pay and divide the income equally per stirpes among the testator's participating issue.

The testator then declared: First, that if any person who if living would be one of the participating issue died leaving children they should take their parent's share of income. Secondly, that if a son died he might by will appoint up to one-half of his income to his wife for her life or widowhood. Thirdly, he created a discretionary trust giving a protected life interest to any beneficiary who forfeited his original interest in income by bankruptcy or alienation.

The testator then declared that from and after the expiration of the period of restriction his trustees should hold his residuary trust estate on the trusts following—namely, if any share of income was then subject to the discretionary trust the trustees were to hold a proportionate share of corpus upon trust for such one or more of the participating issue then living (including the forfeiting beneficiary) and the children of the forfeiting beneficiary as the trustees should within six calendar months after the testator's death (1) nominate and in such shares as they should in like manner specify. And the trustees should hold the rest of the corpus upon trust for the participating issue living at the expiration of the period of restriction (other than and except any forfeiting beneficiary) in proportion to their previous shares of income.

By a codicil dated February 2, 1926, the testator gave his wife an additional annuity of 200*l.* during widowhood and a 10*l.* life annuity to Louisa Jane Langdon and confirmed his will.

(1) Sic.

The testator died on September 6, 1926, and his will was proved by the Public Trustee and a son Arthur, who was qualified to be an executor. He left a widow, three sons, a spinster daughter, and a married daughter with two infant children.

The net estate was worth about 45,000*l.*, of which about 29,000*l.* would have to be temporarily set aside to provide for the widow's annuity, leaving 16,000*l.* balance.

There was great difficulty in ascertaining the descendants of Queen Victoria living on September 6, 1926. It appeared, however, from an affidavit of A. T. Butler, Portcullis Pursuivant of Arms, that in 1922 there were about 120 descendants who had then to be sought in England, Germany, Russia, Sweden, Denmark, Norway, Spain, Greece, Jugo-Slavia and Roumania, and many of whom had probably become scattered over the entire continent of Europe, and might even have gone much further afield. It was not certain whether any of the late Tsaritsa's children were living, and owing to the war many of the continental descendants might fall into penury and obscurity, rendering any future tracing extremely difficult, if not impossible. The expense of a strictly proved pedigree of the descendants living at the testator's death would be very heavy.

In these circumstances the Public Trustee issued this summons on October 10, 1927, to determine (inter alia) whether the trusts of the income during the period of restriction and the trusts of the corpus at the expiration of that period were void for uncertainty or on any other ground. The summons also asked that if the trusts were valid an inquiry might be directed to ascertain who were Queen Victoria's lineal descendants living at the testator's death and whether any and which of them had since died.

J. H. Stamp for the Public Trustee.

Sir Thomas Hughes K.C. and *J. W. F. Beaumont* for the three sons and the spinster daughter. There are really two objections to the period of restriction.

First, it is almost impracticable accurately to ascertain

ASTBURY J. 1928 VILLAR, *In re.* PUBLIC TRUSTEE *v.* VILLAR.

Queen Victoria's lineal descendants living on September 6, 1926. All sorts of difficult questions arise. Are any of the late Tsaritsa's children living? Are the children of morganatic marriages legitimate by English and foreign law?

Secondly, assuming that the initial class of lineal descendants can be ascertained at enormous expense, it will be quite impracticable to keep in touch with all of them and ascertain when the survivor dies, probably some eighty years hence.

The lives in being under the perpetuity rule must be lives "the extinction of which could be proved without difficulty," i.e., lives "to which testimony can be applied to determine when the survivor of them drops," and not lives of which it would be "almost, if not quite, impracticable to ascertain the extinction": see *Thellusson* v. *Woodford* (1) and *In re Moore*. (2) These lives clearly fall within the last category, and the restriction is void because of their uncertainty. It will inevitably give rise to a deadlock. Income will be unable to prove that the class is still in existence; capital will be unable to prove when the survivor died.

Baden Fuller for the widow adopted the same argument.

Topham K.C. and *Bischoff* for the married daughter and her infant children. There is nothing in the first objection. The existing lives can readily be ascertained by an ordinary inquiry. The question of its expense is irrelevant.

The period of restriction is taken from a well known common form (3), the validity of which has never been questioned. Many titles would be upset if it were held void for uncertainty, in which case it would also be void for perpetuity, owing to the supposed uncertainty of the lives.

The validity does not depend upon the number of lives, or the difficulty or expense of ascertaining them, and their duration, but upon the practicability, i.e., the possibility of doing so, now and in future by the usual Court inquiries: *Thellusson* v. *Woodford*. (4) In *In re Moore* (2) the lives

(1) 11 Ves. 112, 134, 136, 146.
(2) [1901] 1 Ch. 936.
(3) The Queen Victoria form appears in Key & Elphinstone's Precedents, 9th ed. (1909), vol. i., p. 498. The editions of 1914, 1923 and 1926 substitute King Edward VII.
(4) 11 Ves. 134, 145, 146.

consisted of all the inhabitants of the globe. Of course no inquiry would be possible in that case.

Unless the Court is prepared to say "now" that a present inquiry is impracticable, and that a future inquiry must in any event be abortive, it cannot invalidate the trust. The mere possibility that in the course of time events may happen to render such a future inquiry abortive cannot invalidate the present trust. That possibility is present even in the case of one life. A man might disappear into the wilds, and never be heard of again. After a time his death would be presumed, but the date of his death would be unascertainable. That possibility would not make a restriction during his life void ab initio for uncertainty or perpetuity.

Sir Thomas Hughes K.C. in reply.

ASTBURY J. [after stating the facts and pointing out the absurdity of the provision requiring the trustees within six months of the testator's death to nominate the participating issue who were to take a share of corpus in proportion to their forfeited share of income continued:] The real question is whether the period of restriction is one that can be given effect to in the circumstances. I feel the gravest doubt as to the validity of this will, having regard to the period of restriction and the circumstances now surrounding the lineal descendants of the late Queen Victoria. This form of restriction has appeared in many books of forms for many years, and the testator in 1921 adopted this form, which having regard to the war and the events during the war and subsequent thereto, is extremely difficult to carry out.

If I could see my way to holding that this capital gift, so restricted, is invalid, I should certainly do so. But there is no authority definitely enabling me so to decide.

The whole matter turns upon the true meaning of the law as explained in *Thellusson* v. *Woodford.* (1) In that case the judges were called in to advise the House of Lords, and their unanimous opinion was pronounced by Macdonald C.B. It is upon the true meaning of that opinion and that of

(1) 11 Ves. 112.

ASTBURY J. 1928 VILLAR, *I nre.* PUBLIC TRUSTEE *v.* VILLAR.

Lord Eldon L.C. that the question must be decided. After referring to the lawfulness of tying up property for any number of existing lives and to *Love* v. *Wyndham* (1), where Twisden J. said that "the devise of a farm may be for 20 lives, one after another, if all be in existence at once," Macdonald C.B. said (2): "By this expression [Twisden J.] must be understood to mean any number of lives, the extinction of which could be proved without difficulty." Later on he said (3): "In *Scattergood* v. *Edge* (4) the Court held, that an executory estate, to arise within the compass of a reasonable time, is good; as 20 or 30 years: so is the compass of a life or lives; for let the lives be never so many, there must be a survivor; and so it is but the length of that life." Then he referred (3) to *Humberston* v. *Humberston* (5), where Lord Cowper considered "all the co-existing lives (a vast many in number) as amounting in the end to no more than one life." Then he referred (6) to *Gurnall* v. *Wood* (7), where Willes C.J. spoke of a life or lives without any qualification, and to *Robinson* v. *Hardcastle* (8), where Lord Thurlow said that "a man may appoint 100 or 1000 trustees, and that the survivor of them shall appoint a life estate." And then he added: "It appears then, that the co-existing lives, at the expiration of which the contingency must happen, are not confined to any definite number. But it is asked, shall lands be rendered unalienable during the lives of all the individuals, who compose very large societies or bodies of men, or where other very extensive descriptions are made use of?" Then he laid down this very important test in answer (6): "It may be answered, that, when such cases occur, they will, according to their respective circumstances, be put to the usual test, whether they will or will not tend to a perpetuity, by rendering it almost, if not quite, impracticable to ascertain the extinction of the lives described; and will be supported or avoided accordingly."

(1) (1669) 1 Mod. 50.
(2) 11 Ves. 134.
(3) 11 Ves. 135.
(4) (1697) 1 Salk. 229.
(5) (1716) 1 P. Wms. 332.
(6) 11 Ves. 136.
(7) (1740) Willes, 211.
(8) (1786) 2 Bro. C. C. 22, 30.

That means that if the circumstances of the gift to be construed are such that the testator has made it substantially impracticable to ascertain the extinction of the lives described, then the gift will be bad. But the difficulty, though great, of ascertaining the extinction of the lives defined is, in my judgment, not sufficient in itself to make the gift bad.

In the House of Lords Lord Eldon L.C. said (1): "When this was put originally as a case, representing that it was monstrous to tie up property for nine lives, it seemed to me a proposition, that is incapable of argument as lawyers; for the length of time must depend, not upon the number, but upon the nature, of the lives. If we are to argue upon probability, two lives may be selected, affording much more probability of accumulation and postponement of the time of vesting, than nine or ninety-nine lives. . . . . It cannot therefore depend upon the magnitude of the property, or the number of lives: but the question always is, whether there is a rule of law, fixing a period, during which property may be unalienable. The language of all the cases is, that property may be so limited as to make it unalienable during any number of lives, not exceeding that, to which testimony can be applied, to determine, when the survivor of them drops."

Now the question I have to decide depends upon the true construction of this passage in combination with Macdonald C.B.'s general test. (2) The joint effect is that, if, in the circumstances of the particular gift and the lives selected, it is substantially impracticable to ascertain the date of the extinction of the lives described, the gift is bad; but if, although the lives are numerous and the ascertainment of the date of the survivor's death is or may be difficult and expensive, the gift will not be rendered invalid if ordinary legal testimony can be applied, and will be available to determine that date.

Now in this case the testator has in 1921 used an old form or precedent, restraining the distribution of his estate to a period expiring twenty years from the death of the last

(1) 11 Ves. 145. (2) 11 Ves. 136.

ASTBURY J. 1928 VILLAR, *In re.* PUBLIC TRUSTEE *v.* VILLAR.

survivor of all the lineal descendants of the late Queen Victoria living on September 6, 1926. That must postpone the vesting for a very long period, but having regard to the character of this class, I have come to the conclusion that I cannot say it will be impracticable, having regard to the legal testimony probably available, to ascertain the period when the capital becomes distributable twenty years after the survivor's death. The expense involved will probably be very great. The trust operates very hardly upon the testator's five children. If I could have seen my way to hold this tying up invalid I would gladly have done so, but in my opinion I am not at liberty to do so.

It must be borne in mind that there are probably many other gifts and trusts now in existence with similar limitations. Years ago this was a very common form of limitation. Its application has presented increasing difficulties as time has gone on, and now, having regard to the war, the difficulties are still more serious. But I feel myself unable to hold that the determination of the period of vesting is beyond the scope of legal testimony in the ordinary sense, and for these reasons this capital gift is good. There will be liberty to apply for an inquiry to ascertain the existing descendants, but that inquiry will be unnecessary if, as I hope, my judgment is reversed on appeal.

Solicitors : *Gregory, Rowcliffe & Co., for Thomas Broomhead, Taunton ; Church, Rendell, Bird & Co., for Bird & Lovibond, Uxbridge.*

N.B.—For a somewhat similar impracticability argument see *Cadell* v. *Palmer* (1833) 1 Cl. & F. 372, 397; Tudor's Real Property Cases, 3rd ed., pp. 424, 443. In that case the testator died in April, 1818, and on May 16, 1918, his estate was finally wound up by Astbury J. in *Bengough* v. *Edridge*, a few months after the period of 28 lives and 20 years had expired.

G. R. A.

In re HOWDEN AND HYSLOP'S CONTRACT.

ASTBURY J.

1928 April 26.

[1928. H. 676.]

Executor—Powers—Scottish Executors—Confirmation—Resealing in England—Real and personal Estate in England—Power to sell real Estate—No separate Grant necessary—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *& 16 Geo. 5, c.* 49), *ss.* 168, 175.

Scottish executors with a confirmation resealed under s. 168 of the Supreme Court of Judicature (Consolidation) Act, 1925, can make a good title to English real estate without the necessity of any separate grant in respect thereof.

Hood v. *Lord Barrington* (1868) L. R. 6 Eq. 218 applied.

Vendor and Purchaser Summons.

By a trust disposition and settlement in Scottish form dated November 21, 1920, and a codicil thereto dated November 14, 1922, the testator, a domiciled Scotsman with property in Scotland, and real and personal estate in England, appointed the vendors executors.

The testator died on October 25, 1927, and on December 29, 1927, confirmation of the vendors as executors was granted by the Edinburgh County Commissariot.

On January 7, 1928, this confirmation was resealed in the principal registry in England.

On January 9, 1928, the vendors as personal representatives of the testator contracted to sell certain English real estate to the purchaser.

The purchaser objected that the resealing of the Scottish confirmation did not give the vendors any power to deal with English real estate, but that the trust disposition must be proved in England before a good title could be made.

On March 1, 1928, after some correspondence, the purchaser issued this summons to determine the point.

Vanneck for the purchaser. This confirmation was resealed under the Supreme Court of Judicature (Consolidation) Act, 1925. Sect. 168 provides that a confirmation which includes besides the estate situate in Scotland "also personal estate situate in England" shall on being resealed "have the like

ASTBURY J. 1928 HOWDEN AND HYSLOP'S CONTRACT, *In re.*

effect in England as if it were a grant made by the High Court," meaning (s. 175) "a grant of probate."

The question is whether that means a full grant or only a grant in respect of the personal estate situate in England.

Now this section is merely a reproduction of s. 12 of the Confirmation of Executors (Scotland) Act, 1858 (21 & 22 Vict. c. 56). Sect. 9 provided for the inclusion of the Scottish and English personal estates separately in one inventory. Sect. 12 applied to a confirmation which included besides the "personal" estate situated in Scotland "also personal estate situated in England," and a resealed confirmation had the effect of an English probate.

That resealed confirmation no doubt enabled the executors to deal with English personalty, including chattels real: *Hood* v. *Lord Barrington.* (1) But where there was also English real estate the practice was to require an English probate. That practice has continued to the present day, notwithstanding the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, s. 2, sub-s. 2, now reproduced by the Administration of Estates Act, 1925 (15 Geo. 5, c. 23), ss. 1, 2: see Tristram & Coote's Probate Practice, 16th ed. (1926), pp. 302, 303.

It is true that the note in Key & Elphinstone's Precedents, 12th ed. (1926), vol. i., Part I., p. 459, states that Scottish executors with a resealed confirmation can make a good title to English leaseholds "and consequently also to English freeholds." But the last six words which first appeared in the 10th ed. (1914), p. 471, are contrary to the established probate practice, which was apparently intended to be preserved by the requirement that the Scottish testator should have "personal estate situate in England" as a condition of resealing under s. 168.

Unless this is so the result is curious. If the Scottish testator has only real estate in England there can be no resealing, and an English grant is necessary. But if there is a scintilla of English personalty, the English Court has no discretion to refuse to reseal the confirmation (2), and the

(1) L. R. 6 Eq. 218, 222. (2) See *In re Rankine* [1918] P. 134.

executors have full power over the English realty. Surely the Legislature cannot have intended this whimsical result.

W. J. Whittaker for the vendors. The requirement that the Scottish testator should have "personal estate situate in England" as a condition for resealing is retained in s. 168, because personal estate is governed by the domicil, and if there were only real estate in England, the Scottish Courts could not affect it. But a scintilla of English personalty gives a right to the Scottish executors to have their confirmation resealed, and thereupon they are in the same position as under an English grant, which since January 1, 1898, vests English real estate in them and enables them to deal with it. The probate practice since that date is obviously wrong.

ASTBURY J. [after stating the facts:] The purchaser contends that according to the practice in the probate registry the resealing of the Scottish confirmation only enables the executors to make title to the English personal estate, including chattels real, and that for English real estate a separate grant is required.

The Confirmation of Executors (Scotland) Act, 1858, provides by s. 12 that a confirmation of the executor of a person who died domiciled in Scotland, "which [confirmation] includes besides the personal estate situated in Scotland, also personal estate situated in England," shall on being sealed with the seal of the principal Court of Probate in England "have the like force and effect in England as if a probate . . . . had been granted by the said Court of Probate."

At that date an English will could only deal, so far as executors were concerned, with personal estate including chattels real.

In *Hood* v. *Lord Barrington* (1) it was held that a Scottish executor with a confirmation resealed under this section had all the powers of an English executor, and could sell and dispose of English leaseholds, although specifically bequeathed, and although by Scottish law an executor could

(1) L. R. 6 Eq. 218, 222.

ASTBURY J. 1928 HOWDEN AND HYSLOP'S CONTRACT, *In re.*

not deal with Scottish leaseholds. Lord Romilly M.R. said: "The consequence of this [section] is that the person who has obtained the confirmation duly sealed is in exactly the same situation as the person who has obtained probate, and until it is recalled he has the title of an executor. He alone can sue or be sued in this country; with it his title cannot be disputed, and without it, it cannot be maintained."

The Land Transfer Act, 1897, which came into operation on January 1, 1898, provides by s. 1, sub-s. 1, that where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives from time to time as if it were a chattel real vesting in them.

Sect. 2, sub-s. 2, provides that all enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and the powers, rights, duties and liabilities of personal representatives in respect of personal estate, shall apply to real estate, so far as the same are applicable, "as if that real estate were a chattel real vesting in them."

These provisions are substantially reproduced by the Administration of Estates Act, 1925, ss. 1, 2, under which the testator's executors sold.

The purchaser contends that notwithstanding these provisions the vendors cannot make a title to the English real estate under the resealed confirmation alone, but must obtain an English grant. He relies upon Tristram & Coote's Probate Practice, 16th ed. (1926), pp. 302, 303, where the practice is stated as follows: "As the scope of a confirmation, when resealed, only extends to personal estate, a confirmation cannot be resealed, if the only property in England consists of realty. In such a case it is necessary, in order to deal with the English real estate, to take out a separate grant in England. . . . . Where a confirmation has been resealed and there is real estate in England, a grant of *realty only* is made to the executors. Reference to the resealing is made in the grant, showing that the executors were thereby

constituted the legal personal representatives of the deceased as regards his personal estate only in England."

No doubt that has been the practice in the probate registry up to the end of 1925.

On the other hand the note in Key & Elphinstone's Precedents, 12th ed. (1926), vol. i., Part I., p. 459, says that "executors under a Scottish will can, after the confirmation has been sealed by the Probate Division, make a good title to English leaseholds: *Hood* v. *Lord Barrington* (1); and consequently also to English freeholds." The last six words first appeared in the 10th ed. (1914), vol. i., p. 471.

The vendors strongly rely on s. 168 of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides that a confirmation of the executor of a person who died domiciled in Scotland "which [confirmation] includes besides the estate situate in Scotland, also personal estate situate in England," shall on being sealed with the seal of the principal probate registry "have the like effect in England as if it were a grant made by the High Court," meaning (s. 175) "a grant of probate or of administration."

This section substantially reproduces s. 12 of the 1858 Act, omitting the word "personal" before "estate situate in Scotland." Now here the testator had personal as well as real estate in England, and the Scottish confirmation was resealed. It is impossible to get out of the plain words of s. 168 providing that the confirmation so resealed has the like effect as a grant of probate. The Scottish executors therefore became the testator's personal representatives in England, and under the law since January 1, 1898, they can make a title to English real estate.

The purchaser contends that the retention of the words requiring "personal estate situate in England" as a condition of resealing a Scottish confirmation shows an intention to confirm the previous practice under the 1858 Act and limit the resealed confirmation to English personal estate, including chattels real. I do not take that view. Sect. 168 expressly says that a resealed confirmation is equivalent to an English probate.

(1) L. R. 6 Eq. 218, 222.

ASTBURY J.
1928
HOWDEN AND HYSLOP'S CONTRACT, *In re.*

It is not really necessary to discuss why the words " personal estate situate in England " were retained in s. 168. Possibly the vendors' explanation is correct. If the testator has only real estate and no personal estate in England the Scottish Courts cannot affect that real estate, there is no resealing, and a separate grant is necessary. But if he has personal estate in England the executors can get their Scottish confirmation resealed, as in the present case. In that case there is no reason for disregarding the plain words of the section making the resealed confirmation equivalent to an English probate.

The purchaser's objection fails, and the summons will be dismissed with costs.

Solicitors: *Vizard, Oldham, Crowder & Cash, for Mills & Reeve, Norwich; Neish, Howell & Haldane.*

G. R. A.

C. A.
1927
CLAUSON J.
Nov. 30; *Dec.* 1, 2.
C. A.
1928
Feb. 29; *March* 1, 23.

CATTON *v.* ASHWELL AND NESBIT, LIMITED.

[1927. C. 3910.]

Workmen's Compensation—Accident arising out of Employment—Incapacity—Voluntary Payments of Compensation—Application by Employers for Review and Termination—Cesser of voluntary Payments—Payment into Court—Alleged Liability to continue weekly Payments until Award that Incapacity had ceased—Action for Breach of statutory Duty—Damages—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *ss.* 12, 21—*Workmen's Compensation Rules*, 1926, *rr.* 19, 59.

A workman having met with an accident in August, 1925, which entitled him to be paid compensation under the Workmen's Compensation Acts then in force, the employers duly made voluntary payments of compensation at the maximum rate payable for total incapacity. On June 24, 1927, the employers being of opinion that the workman's incapacity had ceased since May 30, 1927, applied for a review and termination of the weekly payments as from that date. During July, 1927, they ceased to make weekly payments to the workman and paid into Court, with a denial of liability, the amount of the weekly payments from that date until the date fixed for the hearing of the application to review. In an action brought by the workman in the Chancery

Division against the employers for damages for breach of an alleged statutory duty imposed by the Workmen's Compensation Act, 1925, s. 12, to continue the weekly payments pending an award :—

Held, that s. 12 imposed no obligation on the employers to continue their weekly payments to the workman pending an award deciding whether or not the incapacity had ceased, so that no breach of a statutory duty could be established.

Ocean Coal Co. v. *Davies* [1927] A. C. 271 and *Niddrie and Benhar Coal Co.* v. *Dee* [1927] A. C. 299 applied.

Dicta of Lord Wrenbury and Lord Carson in *Ocean Coal Co.* v. *Davies* [1927] A. C. 271, 292, 297 discussed and explained.

Decision of Clauson J. affirmed.

Semble, that this action would not in any case lie, as it raised a question as to the duration of compensation which was a matter for arbitration under s. 21 of the Workmen's Compensation Act, 1925.

ACTION.

The facts, which were not in dispute, were briefly as follows: The plaintiff, who was a fitter in the employment of the defendants, who were a firm of engineers, on August 1, 1925, suffered personal injury from an accident which entitled him to compensation under the Workmen's Compensation Acts then in force—namely, the Acts of 1906 and 1923; and the defendants paid him compensation, at the maximum rate of 30*s.* a week, up to July 23, 1927, the last payment having been made on July 16, 1927. The Acts of 1906 and 1923 became consolidated by the Workmen's Compensation Act, 1925, which operated as from May 1, 1926, and as from that date the compensation was payable under and by virtue of that Act. Before July 16, 1927, the date of the last weekly payment, the defendants had given notice to the plaintiff that they intended to claim that his incapacity ceased on May 30, 1927, and that as from that date he had been restored to full capacity, and that their obligation to pay compensation had then come to an end.

On June 24, 1927, the defendants applied to the county court for an arbitration by way of review under s. 11 of the Act of 1925, and for an award that, since the plaintiff was under no incapacity as from May 30, 1927, he was no longer entitled to compensation. On July 16, 1927, the defendants paid into Court, with a denial of liability, the sum of 24*l.*, as representing 30*s.* a week from that date to October 14,

C. A. 1927 — CATTON v. ASHWELL AND NESBIT, LD.

1927, the date fixed for the hearing of the application for a review.

The plaintiff moved the county court for an injunction to restrain the employers from discontinuing the weekly payments. On October 7, 1927, the county court judge refused the application, and on October 29, 1927, the plaintiff commenced this action, claiming a declaration that the defendants, having admitted their liability to pay compensation to the plaintiff pursuant to the provisions of the Act of 1925, in respect of the accident suffered by the plaintiff on August 1, 1925, and having paid such compensation by weekly payments of 30*s.* each until July 23, 1927, had since that date committed a breach of their statutory duty, in that they ended the weekly payments otherwise than in pursuance of an agreement or arbitration, without having brought the case within any of the excepted cases mentioned in s. 12 of the Act of 1925; and further claimed an injunction to restrain the defendants from continuing to commit such breach and damages. At the trial of the action the claim for an injunction was withdrawn. At the request of the plaintiff the application for a review was allowed to stand over pending the hearing of this action.

The action came on for hearing before Clauson J. on Nov. 30, 1927.

Sir Henry Slesser K.C. and *C. S. Rewcastle* for the plaintiff. The remedy which the plaintiff is claiming here is by an action for damages arising out of the wrongful retention by the defendants of moneys which they were under a statutory liability to pay to the plaintiff. He is not here claiming compensation by the procedure provided by the Workmen's Compensation Act, 1925. Under the old Acts the employer might end the payments pending the award, but under s. 14 of the Act, 1923 (now s. 12 of the Act, 1925), the employer might not end payments, unless he complied with the conditions there laid down. In the present case the defendants did not end the payments in pursuance of any agreement or arbitration, nor does the case fall within any of the

excepted cases specified in s. 12 of the Act of 1925; so that the effect of s. 12 is that the defendants were not entitled to end the payments, but were bound to continue making them during the period between the date of the last payment and the award. Where there was no agreement before the Act of 1923, and the employer stopped payment, the only remedy of the workman was to apply for arbitration and he received nothing unless and until he had so secured an award in his favour. It was to remedy that state of things that s. 14 of the Act of 1923 was passed. Although a workman might record an implied agreement by the employer to pay and might get execution upon it, he could not do so if the employer had, as in the present case, forestalled him by filing a request for a review—namely, raised the issue whether the workman had recovered. Assume the workman gets his agreement recorded and it is decided that he has recovered at an earlier date, then he will not get any payment in respect of the period pending the determination of the question in issue. Up to the time of the award, under s. 14, the obligation to pay during incapacity the weekly payment continues.

The statutory obligation is imposed for the protection of a particular class, that is, workmen within the meaning of the Act; and there exists no machinery under the Act for determining the question in issue—namely, whether the defendants are bound to continue the payments pending an award; therefore, the plaintiff's only remedy here is by an action for damages for a breach of a statutory duty: Comyn's Digest, vol. i. (1882), 5th ed., p. 434; *Phillips* v. *Britannia Hygienic Laundry Co.* (1) The Act gave no power to the defendants, in the particular circumstances, to pay the money into Court, as he purported to do under r. 19 of the Rules of 1926. The payment into Court was not made in pursuance of proviso (ii.) of s. 12 of the Act of 1925, nor under r. 59, which gives the Court power to suspend payment or direct payment into Court. If the employer had the right, in the circumstances of the present case, to pay into Court, the whole object of s. 12 would be defeated, because the workman would then be

(1) [1923] 2 K. B. 832, 837, 838.

C. A. 1927 — CATTON v. ASHWELL AND NESBIT, LD.

kept out of his money. Payment into Court is not equivalent to payment to the workman. The liability to make the payment to the workman continues until the question of liability has been determined on a review: ss. 9, 11, 21 of the Act of 1925.

We admit that the only damages to which the plaintiff is entitled are the interest on the moneys which have wrongfully been withheld: *Graham* v. *Campbell.* (1) According to the intention of the Act, the weekly payments are to be continued up to the time of arbitration. Compensation is to be made during the incapacity: ss. 1, 9, 11 of the Act of 1925. The effect of s. 12 is to extend the period of payment up to the time at which the incapacity is determined to have ceased, whether by admission or by arbitration. In the case of *Ocean Coal Co.* v. *Davies* (2) the capacity of the workman was admitted, while here the question of capacity or incapacity is the question in issue and can only be determined by the tribunal set up by the Act: until the award is made the employer must continue paying: he may only stop payment in pursuance of an award—namely, subsequent to and in accordance with an award. It is only after the issue of capacity is determined that his incapacity can be said to have ceased as a fact for the purposes of liability to continue the payments under the statute. The principle laid down in *Ocean Coal Co.* v. *Davies* (2) is that the effect of s. 14 of the Act of 1923 is to deprive the employer of the right which he formerly enjoyed of arbitrarily determining the payments before arbitration. It decided that the arbitrator has the right as from an antecedent date to say that incapacity ceased. Lord Atkinson in his speech said (3): "The object of this provision was to deprive the employer of the power or right, to which he was theretofore entitled, arbitrarily, at his own will and pleasure, to end or diminish the weekly payment. Under this section he may still terminate the weekly payment if, in the doing of that, he acts in 'pursuance of an agreement or arbitration.'" And

(1) (1878) 7 Ch. D. 490. (2) [1927] A. C. 271.
(3) [1927] A. C. 284, 285.

he also said: "The workman does not in truth lose his weekly payment by any act of his employer. He loses it . . . . by the operation of the statutory enactment on his admission that his incapacity had terminated." There is also the passage in Lord Wrenbury's speech (1): "A statutory provision that the employer shall not be entitled to end or diminish a weekly payment is a provision that the employer shall de facto continue to pay. . . . . It may be nothing more than an enactment that until the question whether his liability to pay is a continuing liability or not is decided he shall go on paying de facto, and that if it shall be decided that he was not under a continuing liability he shall be left entitled to recover. In my opinion this is the effect of the section." That section is s. 14 of the Workmen's Compensation Act, 1923, which corresponds with s. 12 of the Act of 1925. And Lord Carson follows the reasoning of Lord Wrenbury.

[CLAUSON J. Is not the decision in *Niddrie and Benhar Coal Co.* v. *Dee* (2), that payment must be held in suspense, inconsistent with those dicta of the two learned Lords that the workman is entitled de facto to a continuance of the payment?]

The question in that case was concerning the execution of an award under which the workman was found to be entitled de jure. The workman there took the wrong step when he sought to recover compensation. He ought to have taken the same proceedings as the plaintiff has taken in the present case. The decision there did not affect the dicta of the two Lords in the case of the *Ocean* company. The workman being entitled to have payment de facto made to him would hold the money to abide the event rather as a stakeholder does, on trust. When s. 12 speaks of ending weekly payments, it does not mean payments which the employer is liable to pay de jure, but payments de facto. Lord Dunedin said in the *Ocean* case that s. 12 meant liability de jure or it meant nothing. The rest of their Lordships said if it did not mean liability de jure, it must mean liability de facto. And Lord Wrenbury in the *Ocean* case said that the

(1) [1927] A. C. 292. (2) [1927] A. C. 299.

C. A. 1927 — CATTON v. ASHWELL AND NESBIT, LD.

execution of the award in *Niddrie and Benhar Coal Co.* v. *Dee* (1) was a matter de jure and was not distinguishable from the *Ocean* case, because, if the incapacity in fact has ceased, the award has gone and therefore the basis of the execution has gone, just as in the *Ocean* case. The *Ocean* case, in deciding that the workman is not entitled in an arbitration to recover money whether in fact he has recovered or not, as from the date when the incapacity ceased, decided that the workman has a right under the Act to receive the payments de facto in pursuance of an agreement or arbitration. If ultimately it is found that the workman has recovered, he will have to refund the money in respect of the period between his recovery and the award.

Edgar T. Dale and *J. Alun Pugh* for the defendants. This is an attempt to enforce by proceedings in this Court a weekly payment made under the Workmen's Compensation Acts, which is only recoverable in the county court, the tribunal in which disputes under the Acts are appointed to be tried. The plaintiff might have applied under s. 23 of the Act of 1925 to the county court to record the agreement to pay to him during his incapacity the weekly sum of 30*s*. The defendants applied for a review under s. 11, and under s. 21, the question of fact, whether the plaintiff's incapacity continued after May 30, 1927, can only be decided by arbitration (which is still pending) in the county court. The plaintiff's right to receive the weekly payments during the period pending the award depends upon the finding of the arbitrator on the question whether the plaintiff's incapacity had ceased. Until there has been a finding upon that question, the defendants are under no statutory obligation to continue making the payments. That appears as a result of a careful consideration of the speeches of Lord Atkinson and Lord Shaw in *Ocean Coal Co.* v. *Davies* (2); see also *Niddrie and Benhar Coal Co.* v. *Dee* (1); *Lowe* v. *Essex County Council* (3); and *Pullen* v. *Enthoven & Son* (4), where the principle of the *Ocean* case was followed or applied. The

(1) [1927] A. C. 299.
(2) Ibid. 271.
(3) (1927) 20 B. W. C. C. 452.
(4) (1927) 20 B. W. C. C. 248.

view of Lord Wrenbury and of Lord Carson in the *Ocean* case that the payments must continue to be made de facto up to the date of the award was not, apparently, shared either by Lord Atkinson or by Lord Shaw. Even if that view is the right one, the employer may protect himself, as the defendants did here, by payment into Court for the benefit of the workman: *Niddrie and Benhar Coal Co.* v. *Dee.* (1) In the *Ocean* case there was an admission by the workman of his recovery. It could not make any difference by what process the state of facts is ascertained, whether by means of an admission or by a decision of the Court. Lord Atkinson's speech is consistent with this view. If the employer stopped payment and it were subsequently ascertained by the award that he was wrong in so doing, he might be liable to pay damages in an action, such as the present, on account of his wrongful withholding of the payments; and, if it were ascertained that withholding payment was not in pursuance of an arbitrary act of the employer, there is nothing in the Act which renders such withholding unlawful. In *Niddrie and Benhar Coal Co.* v. *Dee* (1) the Scotch Courts decided that the employer ought to pay up to the award, but that decision was reversed by the House of Lords, which decided that the employer was not obliged to continue paying until it had been ascertained whether incapacity continued or had ceased. The plaintiff cannot establish against the defendants a breach of any legal duty to continue the payments, unless he succeeds in proving a continuance of the plaintiff's incapacity which he is unable to prove in this Court.

When an award has been made an employer cannot be forced to continue paying a moment longer than the duration of incapacity. If payments are voluntary, either workman or employer is at liberty to apply to have the implied agreement recorded under the Act, or the workman may apply for arbitration. The object of s. 12 is to put the case of a voluntary payment on the same footing as if a memorandum of agreement had been recorded or there had been an award;

(1) [1927] A. C. 299.

C. A. 1927 CATTON v. ASHWELL AND NESBIT, LD.

with the result that the employer can stop payment, if he does so in pursuance of arbitration proceedings. If that were not the case, the position of a workman where the payment has been voluntary is more favourable than that of a workman where there has been a recorded agreement or an award. In the former case he might pursue his remedy in the High Court and obtain an injunction, in effect a mandatory one, with, possibly, the consequences of a contempt of Court. If the employer stopped payment alleging that incapacity had ceased and on a review it was found that it had not, he would be directed to pay what he ought to have paid. It is the clear intention of s. 12 that the employer is only to be liable to pay compensation during the incapacity of the workman.

Assuming that the employer is under an obligation to make a de facto payment, he may always protect himself by paying money into Court, as he did here under r. 19 (2.) and (9.); and, if eventually the workman is found to be entitled, the payment into Court will be for his benefit. The Act says that the employer is to pay to the workman or for his benefit, and by paying into Court the employer does not end the payment. The Act does not say that the employer must not stop payment to the workman, it does say that the payment under the Act must not be ended. If the employer stops payment on the ground of the workman's recovery and it is eventually found that he was wrong, the workman in that case may have a right of action in this Court for damages for breach of a statutory duty: but the workman must prove his incapacity, and he can only do that in the county court. He can obtain his remedy in the county court as quickly as he could get his remedy in the High Court. As regards the question of damages, if the workman is deprived of his 30*s.* a week for a week or a fortnight the interest on the sums may be treated as de minimis.

CLAUSON J. In this case I am indebted to counsel on both sides for the careful and exhaustive arguments they have presented to me. [His Lordship then stated the facts and continued:] It is desirable to consider the exact legal

position of the parties on July 23, which was the first weekly day for payment on which the defendants failed to pay the weekly compensation of 30*s.* to the plaintiff.

No award had been made. If there had been an award, the remedy which would have been open to the plaintiff on July 23, when the payment was not made, would, so far as I can see, have been to apply for leave to issue execution under r. 82, and on such application either the registrar would give leave to issue execution or, if he was satisfied that the incapacity had ceased, it may be that he would suspend execution on such terms as he thought proper. That appears to be authorized by the rule. In the present case, however, an award had not been made. Payment had been continuing for some time, and it is admitted by counsel on both sides that there ensued from what had happened an implied agreement, though it had not been reduced into writing, that that payment during incapacity should be 30*s.* a week. Accordingly, in this particular case the right of the workman would be to apply to the county court to register a memorandum of that agreement, and, that memorandum being registered, he would then have the right to issue execution subject to the rule which I have already mentioned. The position would be substantially the same as it would have been, had an award been made.

Now, the defendants in this case had applied for a review, on the footing that the incapacity of the plaintiff ceased on May 30. That application is still pending. In my view, upon the construction of s. 21 of the Workmen's Compensation Act, 1925, it is clear that the only tribunal which has the right to determine the question of fact, whether or not the plaintiff's incapacity ceased on May 30, is the tribunal which for convenience (though the expression is not quite accurate) I will call the county court.

Let me mention here that a sum of money has been paid into the county court by the defendants. It appears that the payment purported to be made under a rule which is mentioned in the notice of payment-in. There has been a decision by the county court judge as to the effect of that

C. A. 1927 CATTON v. ASHWELL AND NESBIT, LD. Clauson J.

payment in. It would not be right or proper that I should express any view as to what the county court judge has decided in that connection, and it does not seem to be material for the purposes of this action that I should deal further with this matter of payment into Court. Payment into Court was not payment to the plaintiff.

Now, in that state of facts, the plaintiff, on October 29, 1927, commenced this action, and he claims a declaration that the defendants have committed a breach of their statutory duty in that, on or about a date which appears in fact to be July 23, they, otherwise than in pursuance of an agreement or arbitration, ended the weekly payments to which I have referred without having brought themselves within any of certain excepted cases in s. 12 of the Consolidation Act, 1925. He also claims an injunction restraining the defendants from continuing to commit the said breach of their said statutory duty and damages.

Now, in these proceedings it is impossible for the plaintiff to say, and he does not say, that the question has been determined one way or the other as to his capacity or his incapacity; and although he alleges that the payment had been made to him and that the defendants are still liable to pay him compensation, he does not allege in fact, or undertake to prove, that his incapacity still continued down to the date of the writ; but, however that may be, if he had alleged it, in my view of the law, it would have been an issue which it would have been impossible for me to try.

In order to explain the relief claimed I must refer to s. 12 of the Consolidation Act. That section is said to place certain duties upon the employer, and the question which the plaintiff seeks to have determined in this action is the true construction of that section. The contention of the plaintiff is that, although the question whether his incapacity continued after the date on which the defendants suggest it ceased is one which has not yet been determined, and which is sub judice in the county court, nevertheless, by reason of the provisions of s. 12 of the Consolidation Act, there is a duty on the defendants to continue paying to him

weekly payments equal in amount to those which have hitherto been paid.

The difficulty which arises is that it has been determined by the House of Lords that, as from the date when incapacity is found to have ceased, there is no liability on the employer to pay the workman compensation under the Act. But it is said on behalf of the plaintiff, that though that may be so, s. 12, on its true construction, makes it the duty of the employer, pending the determination of the question as to whether incapacity has ceased or not, to continue making payments of the same weekly amount, although they will not be payments by way of compensation under the Act, for the House of Lords has determined that liability to make payments for compensation under the Act ceased as from the date when the capacity started; and I have to take s. 12 and construe it, as best I can, in the light of the decided cases, and see whether that section does impose upon the defendants the particular obligation to which the plaintiff contends they are liable. The words of the section are: "An employer shall not be entitled otherwise than in pursuance of an agreement or arbitration to end or diminish a weekly payment except in the following cases"; then there are certain cases specified within which, admittedly, the defendants are unable to bring this case.

Now, first dealing with the matter apart from authority, I should have thought that there would be very considerable ground for saying that the weekly payment there mentioned means the weekly payment which had theretofore been paid—the weekly payment in respect of compensation—and that the section means that, although a man's incapacity may have ceased, until it has been determined that it has ceased, the employer must go on making the same weekly payments as if incapacity continued. I say that with less hesitation, because that is the construction which was placed upon the section by Lord Dunedin in his dissenting judgment in the case of *Ocean Coal Co.* v. *Davies*. (1) Of course, if that had been the true construction of the section, then it

(1) [1927] A. C. 271.

C. A. 1927 — CATTON v. ASHWELL AND NESBIT, LD. — Clauson J.

would be perfectly clear that it would, in the circumstances of the present case, be the duty under the statute of the defendants to continue paying to the plaintiff 30*s.* weekly, on July 23 and subsequent Saturdays, pending the application for review; but that construction I am, admittedly, debarred from placing upon the section, because that was precisely the construction which Lord Dunedin placed upon it in his dissenting judgment, and the majority of the House, in the case of *Ocean Coal Co.* v. *Davies* (1), decided the other way, and decided the other way in such manner that the construction placed by Lord Dunedin, as he himself points out in *Niddrie and Benhar Coal Co.* v. *Dee* (2), must be taken to be a wrong construction. There, however, my difficulties begin, because I have to make up my mind what is the right construction. Now, there are two alternative constructions which have been put forward, and my duty is to make up my mind as best I can which of those two constructions is the correct one, having regard, of course, to the decisions of the House of Lords in the two cases I have just mentioned.

The construction which I have already mentioned and which I have been forced to discard, I will refer to as the first possible construction. The second possible construction is that the employer is bound to continue paying the weekly instalment to the workman until the award is made, provided that ultimately it is found that the incapacity had not ceased, or, to put it slightly differently, it is the duty of the employer to pay this weekly sum to the workman if in fact, though the employer is contending the contrary, incapacity still continues. There are potent arguments, no doubt, against this construction to be found, and to be found particularly in Lord Dunedin's dissenting judgment in the case of the *Ocean* company; but after elaborately considering, with the assistance of counsel, the opinions which Lord Atkinson and Lord Shaw expressed in that case, and for the reasons there stated, it seems to me that that construction of the section is the one which I am forced to take, and that if I took any other construction I should be adopting a

(1) [1927] A. C. 271. (2) [1927] A. C. 299.

construction which differs from that which Lord Atkinson and Lord Shaw arrived at. In the interests of time I do not propose to travel through the details of the arguments on the one side and the other; they will be found fully set forth in the judgments of those learned Lords. Now, of course, if this construction, which seems to me to be the right one for me to adopt, is the correct one, let me see what consequences ensue. It may be that when the issue of capacity or incapacity has been determined, and has been determined against the contention of the employer, it will then be discovered that the employer acted wrongly and in breach of the Act in not having, during the interim period, made the weekly payment to the workman. It may be, accordingly, that if, after that issue had been ascertained and decided contrary to the contention of the employer, an action such as this were commenced alleging a breach by the employer of his statutory duty, some relief might be obtained. It is not necessary for me to decide it, and I do not propose to express any opinion one way or the other; but this is plain, that if this second construction is the correct one, there is at present no cause of action which the plaintiff can possibly sustain in this Court, for on that construction of the Act it is necessary for the plaintiff, before he can prove a breach of a statutory duty by the defendants, to prove that, in fact, during the relevant period incapacity existed. That issue, for the reasons I have already explained, is an issue which this Court has no jurisdiction to try; that is an issue which, under the statute, can be determined, and determined only, by the tribunal appointed under s. 21. Accordingly, even if the plaintiff had alleged here (which as a matter of fact he does not) that, in fact, incapacity continued from July 16 up to the date of the commencement of this action, that is an allegation which he would not be in a position to prove, and he would not be in a position to maintain this action. But, as a matter of fact, his action is not put in that way; the way in which it is put I will deal with when I have spoken of the third possible construction.

C. A. 1927 CATTON v. ASHWELL AND NESBIT, LD. Clauson J.

As I say, it seems to me that I am bound to adopt the second construction. There is one further reason why that second construction seems to me to be one which I am bound to follow, but I will deal with what I understand to be the possible third construction, and the construction which the plaintiff claims to be the correct one.

On the authority of some observations which are to be found in the judgment of Lord Wrenbury and in the judgment of Lord Carson, in the case of the *Ocean* company, which I have already mentioned, it is suggested—and this is the third construction—that the right construction is that the defendant is bound to pay the plaintiff, during the relevant or interim period, the weekly payments, although those payments will be made on the footing that, if the issue of incapacity is ultimately decided against the plaintiff's contention, he will have to return the money. Now, Lord Wrenbury in his judgment certainly indicates that in his view that is a conceivable construction. He draws attention to certain difficulties which arise from that construction—difficulties which, as I understand, he sees no possible way of surmounting, except partially, if it be part of this third construction that the Act implies that it will be the duty of the workman, if he turns out to be wrong on the issue of incapacity, to return the payment; and I think that the language which Lord Wrenbury uses does seem to indicate that he finds something to that effect in the Act. Now, if the matter stood thus I should be in the greatest difficulty. I should have a strong indication, in my view, of the view of two learned Lords one way, and an indication of the view of two learned Lords the other way.

But I must now go on to the next case decided in the House of Lords. That is the case of *Niddrie and Benhar Coal Co.* v. *Dee.* (1) In that case what had happened was this—and here the language in which I state the facts I borrow from the judgment of Lord Dunedin, who delivered the principal judgment in that case. The employers were setting up the case that incapacity had ceased, and certain proceedings

(1) [1927] A. C. 299.

were taken by way of obtaining a medical reference, which left the matter in this position, that in fact the workman was not getting his weekly payments. The position was much the same as it is in the present case. The case differed from the present one in this: that the workman had got a registered decree (which I understand to be what, according to the English procedure, we should call an award), and he proceeded to take a step which was equivalent, as I understand it, under the Scottish procedure, to applying for leave to issue execution in respect of his award; and of course, if the third construction is the correct one, he would be entitled to execution upon his award, which would give him the weekly payment that would be prescribed by the award. It is suggested that the payment which s. 12 directs the employer to make to the workman during the relevant or interim period, is not necessarily a payment under the award, but may be some other sort of payment, though it may happen to be exactly the same sum. With all respect to the argument put to me, I find it is too subtle. It seems to me that if the third construction of the section is correct, it must necessarily follow that during the relevant period the workman, if he comes to the Court and produces the award, and claims to enforce that award, notwithstanding that doubts are thrown on the existence of his incapacity, will be entitled to have an order for the payment of the weekly sum. Now, that is exactly the step which Dee, in the case of the *Niddrie and Benhar Coal Co.* (1), took. He came to the Court, and he asked for payment of his weekly sum, and three successive Scottish Courts held that he was entitled to payment of the weekly sum. They no doubt took the view, and their decrees may have been made upon the theory, that the true construction of s. 12 was the first construction which I have mentioned, that which I am not at liberty to adopt—namely, that s. 12 gives the workman a right, whether his incapacity in fact continues or not, to have a payment weekly which he would be entitled to keep and would in no event be bound to return. At all events, those were the

(1) [1927] A. C. 299.

C. A. 1927

CATTON v. ASHWELL AND NESBIT, LD.

Clauson J.

decrees which they made. The case of *Niddrie and Benhar Coal Co.* v. *Dee* (1) came up before the House of Lords immediately after the case of the *Ocean Coal Co.* had been argued, and Lord Dunedin explains in his judgment that, having regard to the decision in the *Ocean* case, it would be necessary to reverse the decisions in the Courts below; and the decisions in the Courts below were reversed in this way, that the case was remitted to the Court of Session to again grant a sist of execution in order to await the result of the arbitration. As I understand it, that means that the House of Lords ordered the Scottish Courts not to give the man a decree for his weekly payments—to which, so far as I can see, on the third construction of the section he would have been entitled—but to hold the matter up in order to await the result of the arbitration, which seems to me to imply necessarily that the House of Lords took the view that the right of the man to receive his weekly payments depended upon the result of the arbitration, and that if it turned out that his incapacity had ceased, he would not be entitled to have those payments.

Now, that decision seems to me to be plainly inconsistent with any other construction of the Act than the second construction, which is, as I have explained, supported by the judgments in the *Ocean* case of Lord Atkinson and Lord Shaw. If the true view of the speeches of Lord Wrenbury and Lord Carson in the *Ocean* case is that they adopted the third construction of the section—a view to which I am not quite prepared to subscribe—then all I can say is that the decision in the *Niddrie* case, to which those learned Lords were parties, seems to me to be inconsistent with that third construction, and it leaves me with the second construction (which, as I confess, I had already been disposed to adopt on my own reading of the section) in view of the fact that the first construction is not open to me.

Now, I turn back to what this action is. This action claims first of all a declaration as to the legal position of the plaintiff. Upon the construction that I have given to s. 12, I am bound to hold that it is not established in this Court

(1) [1927] A. C. 299.

that the defendants have committed any breach of their legal duty, simply because that cannot be established, on the construction I have given to the section, without showing that the plaintiff's incapacity was continuing during the period in question. That the plaintiff has not attempted to show, and in my view he could not show it otherwise than by production of a decision of the tribunal under s. 21 of the Act—that being in my opinion the only tribunal which has the right to decide that issue. That being so, so far as the action claiming such a declaration goes, it necessarily fails, and it follows of course that there is no case for damages. But I ought to add that had I accepted the third construction which has been put forward by the plaintiff in this action, it would, I conceive, have been my duty to give the plaintiff at least 40*s*. nominal damages, because he would be a person who would have suffered by the failure of the defendants to carry out their statutory duty. I say 40*s*., because I conceive—and this I believe was admitted and agreed by counsel for the plaintiff—that it would not be possible for me to give him by way of damages an order for payment of the sums which had not been paid to him, and it would not have been possible for me, I conceive, to grant an injunction restraining the defendants from withholding payment, because that would be equivalent to an order on the defendants to pay, and I conceive that this action could lie only as an action for damages for not doing that which ought to have been done, and the damages, so far as I can see, would be measured by the loss of interest, which is quite a trivial sum and certainly does not much exceed 20*s*.—the interest lost by the plaintiff by reason of his not having had in his pocket the amount of his weekly payments. That the damages would be confined to that interest appears, from a statement of the law with which Sir Henry Slesser did not, as I understand, quarrel, and which is to be found in the case of *Graham* v. *Campbell* (1) in the judgment of James L.J. delivering the judgment of the Court of Appeal, consisting of James, Cotton and Thesiger L.JJ., in which he says that

(1) 7 Ch. D. 490, 494.

C. A. 1927 CATTON v. ASHWELL AND NESBIT, LD. Clauson J.

the legal wrong which had been suffered in that case " was being kept many months out of his money, and as the law does not regard collateral or consequential damages arising from delay in the receipt of money, it is not right to direct an inquiry on a matter on which we can satisfy ourselves. He is entitled to interest at 5 per cent. during the delay, minus any interest he may have made." That seems to me to be an authority to show that, at the outside, the damages which I could have given would have been measured by the interest on the sums which, on this hypothesis, would have been wrongly withheld, but as that would have been less than 40*s*., I suppose the right order would have been 40*s*. nominal damages for breach of a statutory duty. In consequence, however, of the view which I take of the construction of the section, no course is open to me except to dismiss the action, and accordingly I dismiss the action with costs.

H. C. H.

C. A.

The workman appealed. The appeal came on for hearing on Feb. 29, 1928.

Sir H. Slesser K.C. and *Rewcastle* for the appellant. The employers have committed a breach of their statutory duty by stopping payment of compensation in circumstances other than those in which it is permitted by the Workmen's Compensation Act, 1925, s. 12. The question raised is not a matter for arbitration within s. 21 of the Act. Before s. 14 of the Act of 1923 (now s. 12 of the Act of 1925) the position had been settled by *Gibson & Co.* v. *Wishart* (1), which decided that when a workman had completely recovered from his injuries and no payment was made to him after the date of recovery, the arbitrator could, upon an application to review, terminate the weekly payment retrospectively according to the date of recovery. It is suggested that s. 12 of the Act of 1925 was intended to alter this and to compel the employer (except in a few specified cases) to continue the weekly payments until the question of incapacity

(1) [1915] A. C. 18.

had been determined in one of the ways specified in the section: see per Lord Wrenbury and Lord Carson in *Ocean Coal Co.* v. *Davies.* (1) Clauson J. took the view that the dicta of Lord Wrenbury and Lord Carson were contrary to the views expressed by Lord Atkinson and Lord Shaw in the same case; but the last named judges did not deal with the question of de facto payments. Further, the contention now being advanced is not contrary to *Ocean Coal Co.* v. *Davies* (1), because there the question of incapacity was not in suspense, the workman having admitted that incapacity had ceased. It only decides that in such a case the award may be retrospective. Lord Wrenbury's judgment is that although, if incapacity has in fact ceased de jure payments must also have ceased, s. 12 provides for de facto payments until the question of incapacity has been determined. It is only by giving s. 12 such a meaning that it can have any value at all: see also *Niddrie and Benhar Coal Co.* v. *Dee.* (2)

[LAWRENCE L.J. The judgments in that case negative the view that there can be de facto payments.]

It is submitted not, and in any case it was a very different case from the present one. In *Hosegood & Sons* v. *Wilson* (3) it was decided that where there was an award reducing the weekly payments of compensation from an antecedent date and the employer had continued paying the larger sums up to the hearing he could not deduct them from future weekly payments. But it does not follow that overpayments could not, as Lord Wrenbury suggests in *Ocean Coal Co.* v. *Davies* (4), be recovered from the workman. They would be payments without consideration.

[SARGANT L.J. According to Lord Wrenbury they would be payments under a statutory obligation and, if so, they cannot be paid without consideration.

LORD HANWORTH M.R. A payment under compulsion of law is irrecoverable.]

(1) [1927] A. C. 271, 292, 295, 297; 19 B. W. C. C. 429, 451, 456.
(2) [1927] A. C. 299; 20 B. W. C. C. 1.
(3) [1911] 1 K. B. 30, 33.
(4) [1927] A. C. 271, 295.

C. A. 1928 — CATTON v. ASHWELL AND NESBIT, LD.

In any case s. 12 operates, as it is submitted, to continue the payments when the question of incapacity is in doubt.

Edgar T. Dale and *J. A. Pugh* for the respondents. There is no ground for saying that s. 12 has not an important meaning. Under the law existing before 1923 an employer could not end payments under an award or a recorded agreement without a review terminating the compensation; but he could stop voluntary payments, and leave the workman, if he still claimed to be incapacitated, to apply for an award. Sect. 12 altered the position by preventing the ending or diminishing of voluntary payments (except in certain cases), "otherwise than in pursuance of an agreement or arbitration." At first sight it looks as if by allowing determination in the excepted cases without an agreement or award, the section was conferring a right to determine weekly payments made under an award or recorded agreement which did not exist before; but s. 12, proviso (iii.), makes it clear that this is not so, for nothing in the section is to be construed as "authorising an employer to end or diminish a weekly payment in any case in which, or to an extent to which, apart from this section, he would not be entitled to do so." The correct view, it is submitted, is that ss. 11 and 12 are mutually exclusive. Sect. 11 deals with the determination of weekly payments under an award or recorded agreement by a review. Sect. 12 deals entirely with voluntary payments, and restricts the pre-existing right of the employer to end payments. But s. 12 does not mean that the weekly payments must be continued until an award, although the incapacity has ceased, but that an employer can only stop making weekly payments if he has at the same time commenced arbitration proceedings for a review. If he has done so he is ending the weekly payments "in pursuance of an . . . . arbitration": *Ocean Coal Co.* v. *Davies.* (1) As soon as proceedings for a review have been commenced the employer can pay money into Court under the Workmen's Compensation Rules, 1926, r. 19, sub-r. 2, which is made applicable to proceedings commenced by an employer by

(1) [1927] A. C. 271, 289, 290; 19 B. W. C. C. 429, 448.

r. 19, sub-r. 9. That is what was done here. The amount of weekly payments at the same rate up to the date fixed for hearing was paid in with a denial of liability. The decision in *Gibson & Co.* v. *Wishart* (1) really applies by analogy to s. 12.

It is sought to distinguish *Ocean Coal Co.* v. *Davies* (2), because there the question of incapacity was not in dispute, but the fact that *Davies* v. *Glyncorrwg Colliery Co.* (3) was overruled shows that it applies when capacity is keenly disputed. Here the employers have complied strictly with s. 12. They applied for arbitration, stopped payment, and paid the sums the man would have been entitled to, if incapacity had not ceased, into Court with a denial of liability. In *Ocean Coal Co.* v. *Davies* (4), both Lord Wrenbury and Lord Carson recognized that the employer might protect himself by payment into Court: see too per Lord Wrenbury in *Niddrie and Benhar Coal Co.* v. *Dee.* (5)

Again the question of liability to make a weekly payment can only be settled by arbitration: s. 21. That in effect is the question at issue here. What has been called a de facto payment must be a payment under the Act.

Sir H. Slesser K.C. in reply. It is submitted that no payment into Court would satisfy the obligation to make a de facto payment, if any such obligation exists. What the section contemplates is payment to the workman. Sect. 12 itself sets the limit to payment in by authorizing it in connection with an application under s. 19 to refer the dispute to a medical referee.

If the appellant's contention is right he is entitled to damages: Halsbury's Laws of England, vol. x., p. 305, and the interest the payments would produce is a fair measure of the damages: *Graham* v. *Campbell.* (6) Lastly, the question arising in this case does not fall within s. 21 of

(1) [1915] A. C. 18; 7 B. W. C. C. 348.
(2) [1927] A. C. 271, 289, 290; 19 B. W. C. C. 429, 448.
(3) [1925] 2 K. B. 339.
(4) [1927] A. C. 271, 294, 297; 19 B. W. C. C. 429, 452, 456.
(5) [1927] A. C. 299, 311; 20 B. W. C. C. 1, 11.
(6) 7 Ch. D. 490.

C. A. 1928

CATTON v. ASHWELL AND NESBIT, LD.

the Workmen's Compensation Act, 1925, and is a proper subject-matter for an action in the High Court: *Simmonds* v. *Newport Abercarn Black Vein Steam Coal Co.* (1)

Cur. adv. vult.

March 23. LORD HANWORTH M.R. This is an appeal from a decision of Clauson J., who on December 2, 1927, dismissed the action with costs. The facts must be shortly stated. The plaintiff was employed as a fitter by the defendants, and on August 1, 1925, suffered an accident which entitled him to be paid compensation under the Workmen's Compensation Acts, which were then in force—the Acts of 1906 and 1923—and thereafter, as from May 1, 1926, the Act of 1925. The defendants accepted responsibility, and duly made a weekly payment of the maximum amount, 1*l.* 10*s.*, payable for total incapacity down to and including June 24, 1927. The defendants contended that the plaintiff had recovered and was no longer incapacitated from his accident as from May 30, 1927, and served a notice upon him that they would thereafter discontinue their weekly payments. On June 24, 1927, the defendants applied to the county court of Greenwich for a review of the weekly payments as from May 30, 1927, under s. 11 of the Act of 1925, and for an arbitration to settle the questions in dispute. They made the weekly payments to the workman down to July 16, 1927, and as it was anticipated that the dispute between the parties could not be heard and disposed of until October they paid 24*l.* into the Greenwich County Court to cover their liability to the plaintiff for any weekly payments from July 16 up to the time of the hearing, which was expected to be October 14. That payment into Court must have been pursuant to r. 19, which by sub-r. 9 applies to the case in which an employer has filed a request for arbitration. The defendants do not claim that they are entitled as yet to end the weekly payments "in pursuance of an agreement or arbitration," or under any of the other conditions laid down in s. 12 of the Act of 1925. So the plaintiff moved

(1) [1921] 1 K. B. 616.

the county court for an injunction to restrain the defendants from discontinuing the weekly payments. The county court judge on October 7, 1927, refused the motion, and gave a careful judgment on the questions raised from which I have derived much help, although he appears to have overlooked sub-r. 9 of r. 19 and sub-r. 4 of r. 59. Thereafter on October 29 the plaintiff issued the writ in this action claiming a declaration that inasmuch as the defendants have admitted their liability to pay compensation to the plaintiff under the Workmen's Compensation Act, 1925, and have made the weekly payments to him down to July 16, 1927, they are not entitled to end the weekly payments, for they cannot invoke the aid of s. 12 of the Act, and thus that they are bound to continue the payment of them to him during the waiting period before the arbitration proceedings are heard, and that no payment into Court affects this question.

The action is really brought to determine whether certain dicta contained in the speeches of Lord Wrenbury and Lord Carson in the decision of the *Ocean Coal Co.* v. *Davies* (1) afford a good foundation for the claim now made by the workman to have the weekly payments to him continued, notwithstanding that his employers contend that he has recovered from his incapacity and consequently that his right to weekly payments by way of compensation has ceased. If the question is examined in historical sequence the solution becomes, in my judgment, plain. By the Act of 1906, if a workman in any employment suffered personal injury by accident, arising out of and in the course of his employment, he became entitled to be paid compensation in accordance with the First Schedule of the Act. That Schedule provided that the compensation should be by way of a weekly payment during the incapacity. When the employer had been ordered to make such weekly payments by an award or had agreed to do so by an agreement, he was not entitled to end the payments unless and until there had been a review under cl. 16 of the First Schedule. Then the question was raised whether, when there was a review, the

(1) [1927] A. C. 271; 19 B. W. C. C. 429.

C. A. 1928 — CATTON v. ASHWELL AND NESBIT, LD. — Lord Hanworth M.R.

determination at that review that the weekly payment should be ended, or diminished, was effective as from the date of the review, or whether it related back retrospectively to the date when the incapacity had ceased. It was decided in *Gibson & Co.* v. *Wishart* (1) that the latter was the right view, and that the award for a review spoke as from the date at which it was therein decided that the incapacity of the workman had ceased. Lord Haldane said: "What is brought under review is the continuance and duration of the incapacity"; and Lord Shaw said: "I humbly look upon all the provisions as to procedure for review of the award, to be provisions to enable the Courts and arbitrators to get back to that cardinal point, to prevent compensation during incapacity being turned into compensation during capacity, and so to readjust awards of total or partial incapacity so as to square with the facts."

Then the Act of 1923 was passed which contained s. 14, and that section has been reproduced in s. 12 of the Consolidating Act, 1925. The effect of that section is to take away any right of the employer to end payment which he was making to a workman whether voluntarily or under an award or recorded agreement, except in the manner provided by the section. Inasmuch as the section limited the employer's right to end the weekly payments, it was contended that its effect was to make the employer liable to continue them down to the time when his liberty to end them was given him (*a*) by agreement at the date it was made; or (*b*) by an award in an arbitration when it was declared; or (*c*) the decision of the judge in the procedure available under sub-s. 3. This view, which was adopted by the Court of Appeal in *Davies* v. *Glyncorrwg Colliery Co.* (2), and in *Ocean Coal Co.* v. *Davies* (3), and by Lord Dunedin in *Ocean Coal Co.* v. *Davies* (4), proved erroneous. The majority in the House of Lords in *Ocean Coal Co.* v. *Davies* (5) reaffirmed the principle which had been adopted in

(1) [1915] A. C. 18, 23, 30; 7 B. W. C. C. 348, 352, 360.
(2) [1925] 2 K. B. 339.
(3) 19 B. W. C. C. 223.
(4) [1927] A. C. 271, 278; 19 B. W. C. C. 429, 432.
(5) [1927] A. C. 271; 19 B. W. C. C. 429.

Gibson & Co. v. *Wishart* (1), that the liability of the employer to the workman is limited to the period of incapacity, and that nothing in the new section—now s. 12 of the Act of 1925—altered or extended this liability. Weekly payments, however, may have been made to the workman down to the date of the award, which then decides that the workman's incapacity had ceased at a date previously. As to these some observations were made in *Wishart's* case (1), which must not be overlooked. Thus Lord Haldane said: "Had they [the employers] paid, and were they now seeking to recover the money, another question would arise upon which I express no opinion. The weekly payments would have been made under a decree which was on the face of it valid, and which was not reviewed in any proceeding in the nature of an appeal, but stood until its effect was terminated by the exercise of a subsequent and original jurisdiction. It may be that what had been paid under the first decree could not have been recovered. As to this, I say nothing, for no such point arises." Lord Parker said: "It seems to me to be equally inequitable and contrary to the true intent of the Act to hold that a weekly payment continues after the incapacity, during which it is payable, has wholly ceased." Lord Sumner, dealing with the same point, said: "So too, I think your Lordships are not now concerned with the other assumption, that the employer can never recover from the workman payments once actually made. On that topic contrary expressions of opinion are to be found on the one hand by the President and Lord Adam in the *Pumpherston* case (2), on the other by Cozens-Hardy M.R. and Fletcher Moulton and Farwell L.JJ. in *Hosegood & Sons* v. *Wilson*. (3) I have no opinion to express about it, though I apprehend that the ordinary rules about money paid voluntarily, or under compulsion of law, or under mistake of fact, will suffice to decide the point." In the latter decision of *Hosegood & Sons* v. *Wilson* (3), all the members of the Court of Appeal express the opinion that the employers can recover

(1) [1915] A. C. 18, 24, 34, 45; 7 B. W. C. C. 348, 353, 354, 375.
(2) 1909 S. C. 1292.
(3) [1911] 1 K. B. 30.

C. A. 1928 — CATTON v. ASHWELL AND NESBIT, LD. — Lord Hanworth M.R.

the sums overpaid to the workman when the amount of the weekly payment is reduced as from an antecedent date, in a separate proceeding, although they cannot by reason of the terms of the Act use such overpayments by way of set-off against payments due subsequently. Further, in *Niddrie and Benhar Coal Co.* v. *Dee* (1), which was decided by the House of Lords in accordance with, and immediately after their decision in the *Ocean Coal Co.* v. *Davies* (2), Lord Shaw expresses a similar opinion. He says that where money is paid into Court by an employer and ultimately an award is made that the workman had recovered his capacity so that his right to compensation had ended, "the consigned money will be returned to the employer, no part of it having ever been really due to a workman whose incapacity had ceased." Lord Wrenbury also deals with the position where money has been paid into Court, and where the ultimate decision of the dispute is worked out, not by a reference to a medical referee, but by an arbitration. In the latter case he says: "In my opinion it [the Act] does not leave the employer exposed to the danger and injustice against which the Act protects him if there were a medical reference instead of an arbitration by order of the Court. The Court has, I think, power . . . . to deal with the money in Court in such manner as is right when the arbitration is concluded." The meaning of this is clear from an earlier passage, which shows clearly that the protection sought by the employer was to escape the risk of failing to obtain repayment if the question in dispute were determined in his favour. Lord Carson concurred. I have dwelt upon these opinions, because it is clear from the expressions used, that a number of judges were of opinion that over-payments made to a workman after his incapacity had ceased could be recovered from him; and that even those judges who intended to express no opinion as to the recovery of the payments, said nothing that could be interpreted as indicating that they thought there was a liability

(1) [1927] A. C. 299, 309, 311; 20 B. W. C. C. 1, 9, 11.

(2) [1927] A. C. 271; 19 B. W. C. C. 429.

to continue the payment, as had been held in the Court of Appeal in *Ocean Coal Co.* v. *Davies* (1), and was rejected in the House of Lords. (2)

This action is based upon the expressions used by Lord Wrenbury as to s. 12 being a statutory provision that the employer shall de facto continue to pay, but not necessarily that his liability to pay is thereby enlarged. "It may be nothing more than an enactment that until the question whether his liability to pay is a continuing liability or not is decided he shall go on paying de facto, and that if it shall be decided that he was not under a continuing liability he shall be left entitled to recover." Lord Carson refers to the right of the workman to recover payments if the employer contrary to the section ended the weekly payment. But he adds that the "Courts would have power to insist upon such payments, either to the workman, or if the interests of justice so required, into Court pending the determination of the arbitration." He adds, too, that he cannot understand how such payments confer any right upon the workman to retain them, once it has been decided that the payments were made after the incapacity had ceased.

In my judgment both these opinions must be interpreted in close relation to the matter which was then before the House. Both the learned Lords express the view that if it were determined that the workman's incapacity had ceased antecedently the employers would be entitled to recover the over-payments from the workman. They cannot be taken as indicating that the statute imposed an obligation on the employer enforceable by action at law to make the weekly payments to the workman when the question at issue raised by the employer is that the workman is no longer incapacitated and no longer entitled to receive any compensation. Those speeches were delivered for the purpose of emphasizing the view that the weekly payments depend upon the continuance of incapacity. Both learned Lords, as I have pointed out, adhere to the view that if and when

(1) 19 B. W. C. C. 223.
(2) [1927] A. C. 271, 292, 297; 19 B. W. C. C. 429, 451, 456.

C. A. 1928 — CATTON v. ASHWELL AND NESBIT, LD. — Lord Hanworth M.R.

the issue of capacity or incapacity had been decided in favour of the employer, he would be entitled to recover the payments de facto made. But if there is a statutory obligation on the employer to make these payments and they were made pursuant to process on the law being "set in motion" as suggested, they could not be recovered. It is clear law that where money has been paid by the plaintiff to the defendant under the compulsion of legal process, which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received; see *Marriot* v. *Hampton* (1); and to quote the proposition at the conclusion of the notes to that case, it is clear that "money obtained by compulsion of law, bona fide, and without taking an undue advantage of the situation of the party paying it, is not recoverable": see notes to *Marriot* v. *Hampton*. (1) This proposition had the authority of Sir James Shaw Willes and Sir H. Keating in the third edition. In my judgment the authority of these speeches cannot be invoked as intended to establish that the workman has an independent cause of action under s. 12 of the Act of 1925, to require his employers to go on making payments to him after the issue as to the continuance of his incapacity has been raised, down to the time when it is determined, even though such de facto payments may be recoverable eventually from him by the employers.

There are further difficulties besides those that I have dealt with—namely, that by s. 21 of the Workmen's Compensation Act, 1925: "If any question arises in any proceedings under this Act . . . . as to the amount or duration of compensation under this Act, ... the question . . . . shall . . . . be settled by the arbitration . . . . of a judge of county courts." I doubt whether in any case an independent exterior right could be enforced. The case of *Simmonds* v. *Newport Abercarn Black Vein Steam Coal Co.* (2), which was cited, does not cover the point. In that case there was a right to enforce the duty before the justices, and a declaration was obtained as to the boy's rights by action. But there

(1) (1797) 2 Sm. L. C., 12th ed., pp. 403, 430. (2) [1921] 1 K. B. 616.

was not in the statute in question there a definite direction as to the Court in which questions at issue are to be decided, a Court which is armed with full powers to deal with all questions. It is, however, unnecessary to deal with this point and some others which are referred to by Clauson J.

For the reasons which I have given I agree in his view that no statutory right of action for these intermediate payments is given to the workman under s. 12 in the circumstances of the present case, and I agree with his conclusion that the action must be dismissed. The appeal will be dismissed with costs.

SARGANT L.J. I agree that this appeal should be dismissed. This action is, in my view, a desperate attempt to nullify the decisions in *Ocean Coal Co.* v. *Davies* (1); and *Niddrie and Benhar Coal Co.* v. *Dee* (2), and is bound to fail. Relief similar to that claimed in the present action had already been sought by the plaintiff in proceedings in the county court, and had been refused for the reasons stated by the learned county court judge in a written judgment. I accept the reasoning in that judgment with one comparatively trifling amendment, which tells entirely in favour of the defendants—namely, that the payment into Court made by them appears to have been in accordance with r. 19, sub-r. 9, of the Rules of 1926, and not to have required perfecting by an order of the Court under r. 59. I desire in particular to adopt the following two sentences from that judgment—namely: "Now I think it is clear from the decision of the House of Lords in the *Ocean Coal Co.* v. *Davies* (1) that s. 12 does not give the workman an *absolute* right to continue to receive the weekly payments without regard to whether he has recovered or not. His right to a continuance of those payments is dependent upon the continuance of the incapacity." Had the plaintiff desired to directly challenge the correctness of the decision of the learned county court judge, it was open to him to appeal from it to this Court in the usual way; but instead of so doing, he has started

(1) [1927] A. C. 271. (2) [1927] A. C. 299.

C. A. 1928 — CATTON v. ASHWELL AND NESBIT, LD. — Sargant L.J.

proceedings de novo in the High Court for relief similar to that which had been refused him in the county court. To these proceedings there was this additional objection beyond those which caused his previous failure in the county court—namely, that the question whether the plaintiff had in fact recovered, and the date of such recovery, were matters ultimately determinable in the arbitration proceedings already commenced in that Court, and were entirely outside the jurisdiction of the High Court.

Clauson J., in a careful judgment, has decided against the plaintiff, and I am content to adopt that judgment. I would merely add that if (as I think) the defendants, the employers, were entitled under the Rules to make the payments into Court which they have made, the payments so made are a complete protection to them against the claim in this action that they should make a second set of interim payments of the same amount direct to the plaintiff.

LAWRENCE L.J. The questions arising in this case are first, whether the employers have committed a breach of any statutory duty alleged to be imposed upon them by the provisions of s. 12 of the Workmen's Compensation Act, 1925, and secondly, if the employers have committed such a breach, whether an action in the High Court will lie in respect thereof. Sect. 12 of the Act of 1925 is a re-enactment of s. 14 of the Act of 1923, which latter section has been construed by the House of Lords in the case of *Ocean Coal Co.* v. *Davies* (1), a decision which therefore governs the construction of s. 12 of the Act of 1925 and is binding on this Court. The employers, who since the accident had been making weekly payments voluntarily (that is to say without the sanction either of a recorded agreement or of an award) in July, 1927, discontinued such payments, contending that the workman's incapacity had ceased on May 30, 1927, and that as from that date they were no longer liable to pay any compensation under the Act. Mr. Dale on behalf of the employers admitted that as the case was not one falling

(1) [1927] A. C. 271; 19 B. W. C. C. 429.

under any of the exceptions specified in s. 12, and as there was no agreement in pursuance of which the employers were entitled to end the weekly payments, the employers were not entitled to end the weekly payments otherwise than in pursuance of arbitration. Recognizing this position the employers on discontinuing the weekly payments promptly filed an application under s. 11 of the Act of 1925 for the review of the weekly payments, with the object of obtaining an award that such weekly payments might be ended by them on May 30, 1927.

The decision in *Gibson & Co.* v. *Wishart* (1) shows that the award of the arbitrator may properly be made to operate from the day on which it is alleged and proved that the employers' right to end the weekly payments first accrued, and the decision in *Ocean Coal Co.* v. *Davies* (2) shows that the arbitrator has no power to award that the weekly payments should continue payable after it is proved or admitted that the workman's incapacity has ceased. As, however, the mere filing of an application for review does not entitle an employer to suspend the weekly payments, the employers, as soon as they were notified of the date fixed for the hearing of their application, availed themselves of the liberty given to them by the joint operation of paras. 2 and 9 of r. 19 of the Workmen's Compensation Rules, 1926, and paid into Court a sum sufficient to cover the weekly payments up to the date fixed for the hearing of the arbitration, whilst denying their liability to make any weekly payment after May 30, 1927. No argument has been addressed to us on behalf of the workman that the employers were not acting strictly in accordance with the Rules in making such payment into Court, nor has it been suggested that the money so paid in would not be available for the workman in case the arbitrator should find that the employers had failed to prove that the workman's incapacity had in fact ceased on the day alleged.

In the circumstances, I am clearly of opinion that the employers have not committed a breach of any statutory

(1) [1915] A. C. 18. (2) [1927] A. C. 271 ; 19 B. W. C. C. 429.

C. A. 1928 CATTON v. ASHWELL AND NESBIT, LD. Lawrence L.J.

obligation under s. 12. They have never claimed and they do not now claim that they are entitled to end the weekly payments otherwise than in pursuance of an arbitration; they have taken the necessary and proper steps to obtain the award of the arbitrator that they are entitled to and the weekly payments as on May 30, 1927, and they have availed themselves of the power conferred upon them by the Rules of paying money into Court pending the decision of the arbitrator. The workman, however, was dissatisfied with the procedure thus adopted by the employers. He first applied to the Court for an injunction to restrain the employers from ceasing to make the weekly payments, and then, when that application had failed, he issued the writ in this action asking for a declaration that the employers had committed a breach of the duty imposed upon them by s. 12 and for an injunction and damages. At the workman's request the arbitration has been held up pending the hearing of this action, otherwise it would have been ascertained long ago whether the workman's incapacity had or had not in fact ceased as alleged by the employers.

A more futile proceeding on the part of the workman than this action it is difficult to conceive. If the employers had discontinued the weekly payments and had taken no steps to regularize their position by proceeding to an arbitration, pursuant to which they could lawfully end such payments, the workman would have had his remedy under the Act. In such a case he could, as pointed out by the learned county court judge, have had an agreement recorded and have applied for leave to issue execution. By adopting this procedure he could have compelled the employers either to proceed to arbitration or else to continue the payments. Moreover, he could have applied for payment into Court by the employers pending the arbitration proceedings under r. 59. As in my opinion the workman has failed to prove that the employers have committed any breach of the provisions of the statute it is not really necessary to consider the question whether such an action as this will lie, but I desire

to express my entire concurrence with the opinions expressed on this point by Clauson J. and the Master of the Rolls.

For the reasons stated I agree that this appeal fails and should be dismissed with costs.

Appeal dismissed.

Solicitors: *Mills, Lockyer, Church & Evill; Carpenters.*

H. C. G.

BARTON *v.* KEEBLE.

[1927. B. 733.]

Landlord and Tenant—Lease—Restrictive Covenants—Construction—Breach—Subletting of Part of demised House—Forfeiture—Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 2, *sub-ss.* 1, 3.

In 1906 the Estates Governors of Dulwich College, as lessors, granted to K., as lessee, a dwelling-house and premises on the Dulwich estate for a term of ninety-nine years at a ground rent of 8*l.* a year, and the lessee covenanted with the lessors that he would not, without the lessors' previous licence in writing, use the demised house, or any part thereof, "for any purpose whatsoever other than for the purpose of a private dwelling-house, wherein no business of any kind is carried on." There was a further covenant by the lessee that he would not do or suffer to be done in or on the demised premises anything which might in the judgment of the lessors be or grow to the injury or annoyance of the lessors or their tenants, or the occupiers of adjoining premises. In 1914 the lessee, without the knowledge of or licence from the lessors, sublet three rooms of the first floor of the demised house to a sub-tenant, whose tenancy expired in June, 1926.

On July 19 the lessee, without any licence from the lessors, sublet the same three rooms on the first floor of the house to the defendant P. as a sub-tenant at a rent of 1*l.* a week. In an action by the lessors against K. and P., and the mortgagees of K., claiming possession of the house as against all the defendants on the ground that the lease had been forfeited by reason of the breaches of the two covenants:—

Held, that there had been a forfeiture of the lease by breaches of both the restrictive covenants, and that the words in the first covenant, "wherein no business of any kind is carried on," must be construed as adding to the stringency of the covenant that the house should be used as a private dwelling-house.

Held, further, that the Rent and Mortgage Interest Restrictions Acts, 1920–1923, afforded no defence to the action, as the landlord K. was in actual possession of the whole of the dwelling-house in the interval between the two tenancies, and s. 2, sub-s. 1, of the Act of 1923 came into operation, and the premises had become decontrolled.

WITNESS ACTION.

The plaintiffs in the action were a body of gentlemen constituting the Estates Governors of Alleyn's College,

EVE J.
1928
BARTON
v.
KEEBLE.

Dulwich, in the administrative county of London, and were the owners of the reversion in fee simple expectant on the determination of the term next hereafter mentioned granted by a lease of (October 11, 1906) the hereditaments thereby demised, known as "Newlands," No. 128 Woodwarde Road, Dulwich. By the said lease the Estates Governors, as lessors, demised to the defendant, Harry James Keeble (the lessee), all that parcel of land with the dwelling-house out offices and buildings thereon known as "Newlands" Woodwarde Road Dulwich for a term of ninety-nine years from March 25 1906 at (after the first three years) the yearly rent of 8*l.* payable quarterly on the usual quarter days. And the lessee covenanted for himself and his assigns with the lessors that he would duly observe and perform (inter alia) the following covenants, that is to say :—

No. 14. "Will not, without the lessors' previous licence in writing, use the premises or any part thereof, or permit the same to be used for any purpose whatsoever other than for the purpose of a private dwelling-house wherein no business of any kind is carried on."

No. 15. "Will not, without the lessors' previous licence in writing, do or suffer to be done in or on the demised premises anything which may in the judgment of the lessors be or grow to the injury or annoyance of the lessors or of any of their tenants, or of any of the occupiers of any contiguous or adjoining premises or of the public or neighbourhood."

The lease also contained a condition enabling the plaintiffs to re-enter on the demised premises on the failure or neglect of the lessee to perform or observe any of the covenants therein contained.

The description of the house and the circumstances under which the first subletting took place are taken from the judgment of the Court as follows : "The house is one of a number of similar houses erected some twenty odd years ago, and undoubtedly intended to be occupied as private dwelling-houses. It has an elevation of two floors, the ground floor of four rooms with hall and staircase, and the upper floor, also of four rooms, with a bathroom and lavatory. So far

as is known it was occupied down to some date in 1914 solely by the lessee and his family. In that year, without the knowledge of the plaintiffs, Mr. Keeble let three of the upper rooms, unfurnished, to a tenant whose tenancy expired in June, 1926, and on July 2 there appeared in a local paper an advertisement wherein Mr. Keeble advertised to be let from July 19 'three rooms unfurnished, first floor, no children, suit middle-class couple, rent 1*l.* a week, 128 Woodwarde Road, Dulwich.'

In response to that advertisement Mr. H. F. Parkins, the second defendant, at once called upon Mr. Keeble, and, having inspected the rooms, he agreed to take them for himself and his wife, and by way of deposit paid 1*l.*, the equivalent of one week's rent, to Mr. Keeble. In the meantime the attention of the secretary and manager of the plaintiffs had been called to the advertisement, and on July 3 he wrote a letter to Mr. Keeble pointing out that the proposed letting was contrary to the terms of the lease, and asking for an undertaking that it would not be proceeded with. Before this letter reached Mr. Keeble's hands the transaction between him and Mr. Parkins had been completed, and on July 19 Mr. Parkins and his wife entered into occupation of the upper floor and remain there to this day. Not a word can be said against the respectability of the undertenants, nor is it suggested that their occupation would give rise to any complaint if it does not constitute a breach of covenant."

The premises demised by this lease formed part of a large estate at Dulwich belonging to the Estates Governors and containing some 3500 houses, and were alleged by the plaintiffs to be in the residential portion of the estate. The plaintiffs, by their statement of claim, alleged that the subletting aforesaid of the three rooms and the occupation and user thereof by Mr. Parkins was a breach of the two covenants 14 and 15 above stated. On December 21 the plaintiffs served notice on the defendant H. J. Keeble, specifying the breaches of the lessee's covenants and requiring him to remedy the same and to make compensation in money therefor. The defendant Keeble having failed

EVE J.
1928
BARTON
v.
KEEBLE.

to comply with the plaintiffs' demand, they brought this action on February 21, 1927, and claimed as against all the defendants possession of the demised premises, and a half-year's arrears of rent from H. J. Keeble, and damages for breach of the covenants 14 and 15.

By his defence, the defendant H. J. Keeble denied that the subletting of the three rooms and the user thereof was a breach of the two covenants referred to, and counterclaimed that if it should be held that the defendant's term was subject to forfeiture the defendant would ask to be relieved from such forfeiture upon such terms as the Court should think fit. The defendant, Mr. Parkins, by his defence also denied that the subletting to him was a breach of either of the covenants, and contended that as against him the plaintiffs were estopped from relying upon such breach in that prior to such subletting the plaintiffs had permitted similar subletting and user and occupation on the said estate. This defendant also pleaded the Rent and Mortgage Interest Restrictions Acts, 1920–1923, as a defence, and asked to be relieved from forfeiture, if there had been a breach of covenants, according to the Law of Property Act, 1925, s. 146, sub-s. 4.

The other defendants to the action were the National Freehold Land and Building Society, who submitted that there was no cause of action by the plaintiffs, but took no active part in the defence, and asked for a vesting order if necessary under the Law of Property Act, 1925, s. 146, sub s. 4.

Witnesses were called on both sides.

Bennett K.C. and *F. E. Farrer* for the plaintiffs. The majority of the 3500 houses on this large estate are let for private residential purposes by long leases at ground rents, and it is desired to preserve the amenities of the estate by enforcing the covenants that the houses should be used as private dwelling-houses. In certain parts of the estate there were workmen's houses let at rack rents as separate tenements. But if houses of the character of the house in Woodwarde Road were permitted to be used as tenement houses and let in parts, it would seriously diminish the value of the estate as a whole.

The restrictive covenant 14 against the house being used for any other purpose than as "a private dwelling-house" is a very usual one, and has come before the Courts in several unreported cases, particularly in *Berton* v. *London and Counties House Property Investment and Realization Co.*, before Rowlatt J. on May 18, 1920, and before the Court of Appeal on November 17, 1920, where the facts were similar to those in the present case, and there are other unreported cases relating to the Duke of Westminster's estate. Reported cases on similar words are *Kimber* v. *Admans* (1) and *Berton* v. *Alliance Economic Investment Co.* (2), which was a decision on identically the same covenants as in the present case. Atkin L.J. in that case referred to *Berton* v. *London and Counties House Property Co.* (3), and said that the Court of Appeal there held that to let in separate tenements a precisely similar house in the same neighbourhood was a breach of a covenant to use that house "only as a private dwelling-house." The addition of the words in the present case, "wherein no business of any kind is carried on," must be read as emphasizing and adding to the stringency of the preceding words, and not as a qualification thereof. The defence of the Rent and Mortgage Interest Restrictions Acts set up by the defendant Parkins cannot be supported upon the facts here, where the landlord Keeble was in actual possession of all the dwelling-house and premises between the departure of the earlier tenant and the subletting to Parkins. The premises then became decontrolled and the Act inapplicable. Relief against the forfeiture claimed by the defendants is in the discretion of the Court, and may be granted upon terms.

Cartwright Sharp for the first defendant. First there has been no breach of either of the covenants in the lease on the true construction of the same. The house is still a private dwelling-house wherein no business is carried on. Further, the lease contains no covenant by the lessee against subletting without the consent of the lessors or against

(1) [1900] 1 Ch. 412. (2) [1922] 1 K. B. 742.
(3) Nov. 17, 1920. Unreported.

EVE J. 1928 BARTON v. KEEBLE.

assigning. Secondly, the true test is as to the user of the premises, and admittedly there is no breach as to that. If there be a breach of the covenants this defendant is entitled to be relieved from the forfeiture.

Hockman for Parkins, the sub-tenant. There has been no breach of these two covenants, and in any case no continuing breach. If there has been any breach it has been waived by similar subletting on other parts of the estate, and the plaintiffs are estopped by their conduct. Then Rent and Mortgage Interest Restrictions Acts, 1920–1923, apply, as the property has become controlled under the Act of 1920, and Parkins cannot be evicted: *Cohen* v. *Gold.* (1) The landlord here was not in actual possession of the house and premises at the time of this subletting. In *Hall* v. *Rogers* (2) the landlord did not reside upon the premises, and was not in actual possession when the subletting took place, so that case is distinguishable. In the present case there was a mere change of the tenancy, and the premises remained controlled under the protection of the Acts. *Russoff* v. *Lipovitch* (3) shows that the county court had jurisdiction to entertain such an action as this, as it arose out of the Act within the meaning of s. 17, sub-s. 2, of the Act of 1920, and this action might have been prosecuted there. This subletting was not unlawful, and the plaintiffs are not entitled to succeed.

Roger Turnbull for the National Freehold Land and Building Society.

Bennett K.C. in reply was not called upon as to the application of the Rent and Mortgage Interest Restrictions Acts. There has been a clear breach of the second covenant (15), as well as of the first, and a continuing breach, whereby injury is done to the lessors and their other tenants, and it entitles the lessors to re-enter.

EVE J. By a lease dated October 11, 1906, the plaintiffs, the Estates Governors of Dulwich College, demised to the defendant, Mr. Harry James Keeble, a messuage and premises known as 128 Woodwarde Road, Dulwich, for a term of

(1) [1927] 1 K. B. 865. (2) (1925) 41 Times L. R. 341.
(3) [1925] 1 K. B. 628.

ninety-nine years from March 25, 1906. In this action they claim to recover possession of the demised premises on the ground that the lessee in breach of covenants contained in the lease has used them otherwise than as a private dwelling-house, and has thereby done or permitted to be done something which may be or grow to the injury, or annoyance of the plaintiffs, or their tenants, occupants of the neighbouring houses. Mr. Keeble denies that he has committed any breach of covenant.

The first question, therefore, is whether what has been done involves a breach of any of the lessee's covenants contained in the lease. The plaintiffs allege that it is a breach of the covenants numbered 14 and 15 in the lease. [His Lordship read these two covenants as set out above and continued:] It must be conceded, for it has been so determined by authorities binding on this Court, that if covenant number 14 had stopped at the words "of a private dwelling-house" that which has been done would constitute a breach of that covenant. But the covenant does not stop there; it concludes with the words "wherein no business of any kind is carried on." At first sight those concluding words seem either superfluous, or inconsistent with the earlier part of the clause prohibiting user for any purpose other than for the purpose "of a private dwelling-house," and there is some difficulty in appreciating what the draftsman had in mind when he penned that addition. On the one hand it is suggested that he probably was contemplating that class of case wherein questions have arisen as to whether or not a particular user involved the carrying on of a business; cases wherein it has been argued that the practice of a profession, the reception of paying guests, or the carrying on of some charitable work has not involved a breach of a covenant to use the premises as a private dwelling-house and not to carry on a business there, and that his intention was to include every kind of business in the prohibition.

On the other hand it is said that the expression "a private dwelling-house" is capable of more meanings than one, according to the context in which it is found, and that

EVE J. 1928 BARTON v. KEEBLE.

according to the true construction of this covenant so long as the house is not used for business purposes of any kind there is no user of it for any purpose other than for the purpose of a private dwelling-house. In support of this contention reliance was placed on the next following covenant (No. 15), under which the lessors could restrain a user which although not a breach of covenant number 14 might still be of such a nature as to be in their judgment a cause of injury or annoyance to them or their tenants.

The question is what effect am I to give to these words "wherein no business of any kind is carried on"? Ought I to read that as something intended to add to the stringency of the covenant, or is it in the nature of a qualifying addendum? The difficulty in treating it as a qualification is that the covenant so qualified would, so long only as no business was carried on, admit of user inconsistent with what was contemplated by the first part of the clause. The premises are to be used as a private dwelling-house only, any sub-division is inconsistent with that; and yet if the concluding words are to be read as defining the private dwelling-house as being one wherein no business is being carried on it would seem that each room in the house might be sublet separately without any breach of the covenant. I cannot think that this is the true construction of the clause. I think the words must be treated as an addition to something which already operates to prevent a subletting of any part of the premises, and that its only effect is to emphasize the fact that no business of any kind must be carried on upon the premises.

I think, therefore, as far as Mr. Keeble is concerned the defence raised upon the construction of the contract fails, and that there has been on his part a user of the premises for purposes other than those of a private dwelling-house. It is not necessary for me to recapitulate the grounds on which the Court of Appeal and my brethren have held that a divided occupation is a breach of a covenant to use as a private dwelling-house. There are obvious reasons why a house occupied by two separate families cannot be accurately described as a single private dwelling-house. It may well be,

as was suggested in the course of the argument, that the agreement to sublet did not involve a breach of the covenant not to use, and that as long as the agreement was executory the only remedy of the lessors would be by a quia timet action, but when actual user followed, the breach related back to the agreement, and in its nature it is in my opinion a continuing breach. So far therefore as Mr. Keeble is concerned I think there is no defence to the action.

The position of Parkins is somewhat different. He, of course, had notice of and is bound by the covenant contained in the lease under which his immediate lessor holds; but it is said that by virtue of the Rent Restriction Acts, 1920–1923, he cannot be evicted, since no order can be made for recovery of possession against him under s. 5 of the original Act as amended by s. 4 of the Act of 1923. Whether this is so or not apart from the decontrol I need not inquire. The rooms let to Parkins by Keeble prima facie constituted a dwelling-house within the Act of 1920, but by s. 2 of the Act of 1923 it is provided that "where the landlord of a dwelling-house to which the principal Act applies comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the date when the landlord comes into possession the principal Act shall cease to apply to the dwelling-house." By sub-s. 3 of the same section it is provided that "for the purposes of this section the expression 'possession' shall be construed as meaning 'actual possession,' and a landlord shall not be deemed to have come into possession by reason only of a change of tenancy made with his consent." It was at first assumed, on the footing that the letting in July, 1926, was the first letting made by Mr. Keeble, that he had not been in the position of a landlord of this dwelling-house at any time prior to that date, and the decision in *Cohen* v. *Gold* (1) was relied upon as supporting the argument on behalf of Mr. Parkins, that in these circumstances the dwelling-house has not been decontrolled, but later on, when it appeared from Mr. Keeble's evidence that there had been a previous letting, which expired

(1) [1927] 1 K. B. 865.

EVE J. 1928 BARTON v. KEEBLE.

in June, 1926, the argument based on *Cohen* v. *Gold* (1) was abandoned, and it was contended that Keeble had not in fact been in actual possession within the meaning of s. 2 between the expiry of the one tenancy and the commencement of the other, and that in consequence no decontrol had been brought about. In support of this argument the judgments in *Hall* v. *Rogers* (2) were relied upon. In that case, which came before a Divisional Court on appeal from the county court, the county court judge had found as a fact that the landlord of the premises, who did not reside upon them, and whose business relating thereto was done by an agent, had never been in actual possession between the two lettings, and in the Divisional Court it was held there was evidence to support that finding, and the appeal was dismissed. But the evidence here discloses a wholly different set of facts. The dwelling-house here consists of three rooms on the upper floor with a joint user of the staircase, the bathroom, the lavatory and to some extent of the kitchen on the ground floor. Mr. Keeble, the landlord, was living in the house all the time, and when his tenant went out in June, 1926, so far from there being a mere change of tenancy there was, as his advertisement shows, a period of some three weeks or more during which he elected to retain possession of the entire premises, including the whole of this dwelling-house. In those circumstances I am bound to hold that the landlord was in actual possession of the dwelling-house for the period between the conclusion of one tenancy and the beginning of Mr. Parkins' tenancy. Sect. 2, sub-s. 1, therefore, came into operation, and as from the departure of the earlier tenant in June, 1926, these premises were in my opinion decontrolled. The defence based on the Rent Restrictions Acts therefore fails.

An attempt was made to show that in some way or another the plaintiffs had acquiesced in breaches by other tenants of the covenants sued on in this action, and some particulars were given, but the evidence tendered in support of the particulars made it clear that so far from having acquiesced in any breaches the plaintiffs have been diligent in all cases

(1) [1927] 1 K. B. 865. (2) 41 Times L. R. 341.

brought to their attention in prosecuting inquiries and in insisting upon any breaches thereby disclosed being remedied. That defence really came to nothing, and the plaintiffs are in my opinion entitled also to judgment against Mr. Parkins.

The third defendants are the mortgagees of the first defendant, and are here to see that their security is protected; no relief is sought against them, except of course that they will be bound by any judgment pronounced in the action.

One other point was raised in the course of the argument. It was argued that the claim of the plaintiffs is one arising out of the Rent Restrictions Acts, and ought therefore to have been prosecuted in the county court; but this is not so, as the demised premises are not within the mischief of the Acts, and s. 17 of the Act of 1920 has no application.

The result is that I must declare that there has been a breach on the part of the first two defendants of both of these covenants, and an order must be made against them for recovery of possession. The operation of the order will be suspended for three months to enable the defendants to remedy the breach. They must pay the plaintiffs' costs of the action and counterclaim, and if they so do within one month from the date of the Taxing Master's certificate and remedy the breach within the three months, they will be relieved from the forfeiture. If they fail to comply with these conditions any of the other parties to the action may apply. The mortgagees will add their costs of action and counterclaim, to be taxed as between solicitor and client, to their security.

Solicitors: *Druces & Attlee; H. H. Wells & Sons; Tucker & Co.*

G. M.

C. A.
1928
Feb. 17, 20, 28;
March 23.

In re ROWLAND HENRY BLYTH GREENE.
In re WINIFRED HARRIET BLYTH GREENE.
In re SARAH HANNAH WHITWORTH.
In re E. A.
In re CHARLES RICHARD MATHEWS FRASER.
In re ROBERT JAMES WOOD.

Lunacy—Settlements of Lunatics' Property—Applications by Mother—Second Cousins — Change of Law of Intestacy — Change in Circumstances — "Suffer an injustice"—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 171, *sub-s.* 1 (*b*) (*c*).

By s. 171, sub-s. 1, of the Law of Property Act, 1925: "The Court may direct a settlement to be made of the property of a lunatic . . . . on such trusts and subject to such powers and provisions as the Court may deem expedient, and in particular may give such directions . . . . (*b*) where the property has been acquired under a settlement, a will or an intestacy, or represents property so acquired; or (*c*) where by reason of any change in the law of intestacy or of any change in circumstances since the execution by the lunatic . . . . of a testamentary disposition . . . . or for any other special reason the Court is satisfied that any person might suffer an injustice if the property were allowed to devolve as undisposed of on the death intestate of the lunatic . . . . or under any testamentary disposition executed by him."

In the two first cases under a marriage settlement dated October 16, 1879, personalty funds were settled by a husband and wife upon trusts under which (after the death of the husband in 1915) the wife was entitled to the income for life with a power of appointment by deed or will among the issue of the marriage, and in default of appointment the funds were settled in trust for the two surviving children (now aged forty-six and forty-four years), who by inquisitions in 1902 and 1910 had been certified to be of unsound mind. In default of children who attained twenty-one or being daughters married, the wife's fund would have passed to the wife absolutely and the husband's fund to the husband, who had given all his property to his wife.

By his will the wife's father, who died in 1885, gave his residuary real and personal estate upon trusts under which (in the events which had happened) his daughter, the wife, received the income for her life with a power of appointment by deed or will amongst her issue. In default of appointment the residue was settled on trusts under which the wife's two children were the only beneficiaries.

Neither of the children had made a will and, apart from their mother and an aunt aged eighty-two, who was a spinster of unsound mind, their next of kin were second cousins, so that if they survived their mother and aunt the Crown would take on their deaths under an intestacy.

In these circumstances the wife took out summonses under the Law of Property Act, 1925, s. 171, asking the Court to direct settlements of the children's personal property under the marriage settlement and

her father's will, which should include trusts in her favour absolutely after the death of each child or, alternatively, a general power of appointment by will so as to enable her to benefit friends and charities in which the family had always been interested.

Before the applications were heard an arrangement was come to between the wife and the Crown by which, subject to the approval of the Court, the Crown consented to the wife's having a general power of appointment over the whole of the marriage settlement funds and over the father's residuary personal estate to the extent of 21,140*l.*, being the amount provided by the wife out of her own money as a maintenance fund for the children, upon the wife's abandoning all claim to the rest of her father's residuary estate, valued at about 285,000*l.*, and agreeing to supplement the income of the maintenance fund for the benefit of the children as theretofore :—

Held, that there was no ground justifying the Court in making a settlement in respect of the wife's father's residuary estate, for no injustice would be suffered by the wife within s. 171, sub-s. 1 (*c*), if each child's share of the property was allowed to devolve as on an intestacy on his or her death, nor ought the trusts to be altered under s. 171, sub-s. 1 (*b*) ; but that as the Crown did not oppose a settlement of the marriage settlement funds orders would be made for settlements of the two children's shares so as to give the wife a general power of disposal over the funds. The provision of the maintenance fund of 21,400*l.* did not afford a ground for directing settlements under s. 171, but the wife would remain free to apply for recoupment under the Lunacy Act, 1890, s. 117, if so advised.

In the third case an application for a settlement was made by a widow, aged eighty-one years, and first cousin of the patient, who was sixty-two years of age. The only other near relatives of the patient were two first cousins, who were born in 1847 and 1850 respectively, and who were and always had been resident in South America. In her affidavit in support of the application the appellant stated that by reason of her own great age and that of her two cousins in South America any settlement which the Court might be pleased to direct would not be of any material benefit to the patient's next of kin unless its scope were extended to include children of any deceased first cousins of the patient's mother :—

Held, that there was no sufficient ground shown for directing a settlement to be made.

In the fourth case the patient had made a will in 1887, by which he had disposed of his residuary estate equally between his wife and children as a class. The wife had since died, as had also one of patient's sons, leaving issue. The patient's family were desirous that the deceased son's issue should be in no worse position than they would have been if their father had survived the patient.

Held, that the case was a proper one for the exercise by the Court of its discretion under s. 171, by directing a settlement.

In the fifth case the property of the patient was derived under the will of his maternal grandfather. It has been settled by the patient's mother on her marriage with his father, whom she had divorced in

C. A.

1928

GREENE, *In re.*

WHITWORTH, *In re.*

E. A., *In re.*

FRASER, *In re.*

WOOD, *In re.*

1877, and who had not since been heard of. The object of the application was to exclude any claim by the father or his family:—

Held, that a settlement ought to be directed.

In the sixth case the patient had made a will in 1922 leaving the whole of his property to his wife, and in 1925 became of unsound mind. The will had been lost. On an application by the wife for a settlement evidence was produced which satisfied the Court as to the fact of the loss and as to the contents of the will:—

Held, that a settlement carrying out the terms of the will ought to be directed.

THESE were summonses taken out in the above matters under the Lunacy Act, 1890, and amending Acts, asking that pursuant to s. 171 of the Law of Property Act, 1925, a settlement might be directed of the property of the respective lunatics on such trusts for the benefit of the respective applicants or otherwise and subject to such powers and provisions as the Court might deem expedient.

In re ROWLAND HENRY BLYTH GREENE.
In re WINIFRED HARRIET BLYTH GREENE.

By a settlement dated October 16, 1879, made upon the marriage of Henry David Greene and Harriet Rowland Greene (then Harriet Rowland Jones) the said husband and wife each transferred securities of the value of 12,500*l.* to trustees, and declared that the trustees should hold the same upon trust either to retain the same or to sell them with such consent or at such discretion as therein mentioned and invest the money produced by any such sale as therein mentioned. And it was declared that the trustees should hold the said respective securities and the investments representing the same (hereafter called respectively the husband's fund and the wife's fund) upon the trusts therein mentioned during the life of the said husband and after his death upon trust to pay the income to the said wife during her life and after her death In trust as to both the said funds and the income thereof for all or such one or more exclusively of the other or others of the issue of the said intended marriage at such age or time or respective ages or times if more than one in such shares and in such manner as the said husband

and wife should by deed or deeds with or without power of revocation and new appointment appoint and in default of and subject to any such appointment as the survivor of them should in like manner or by will or codicil appoint And in default of and subject to any such appointment In trust for the children or any the child of the said intended marriage who being sons or a son attained the age of twenty-one years or being daughters or a daughter attained that age or married and if more than one in equal shares. In default of children of the marriage the trustees were to hold the husband's fund in trust for the husband, his executors, administrators and assigns and to hold the wife's fund upon trust for such persons or upon and for such purposes as the said wife should, notwithstanding coverture by will or codicil, appoint and in default of and subject to such appointment In trust (in the event which happens of the wife surviving the husband) for the said wife her executors and assigns. The settlement also contained a covenant by the wife to settle after acquired property.

By his will dated April 22, 1884, John Jones (hereafter called "the testator"), who died on May 10, 1885, after making certain devises and bequests, devised and bequeathed all his residuary real and personal estate to trustees upon trust at such time or times as they should think expedient (but with power to retain any securities as therein mentioned) to sell call in and convert into money the same and out of his personal estate to pay his funeral and testamentary expenses debts and legacies and to invest the residue of the said money as therein mentioned and to hold the said residuary trust funds upon trust (subject to certain trusts for the benefit of his wife who died in 1885) to pay the income to his only daughter the said Harriet Rowland Greene (hereafter called "Mrs. Greene") during her life except that if his said daughter should at any time or times after the decease of his said wife decide that it was prudent to pay over by way of settlement or otherwise for the benefit of one or more of her children respectively a sum in each case of 10,000*l.* the trustees were to assist in and consent to such

C. A. 1928 GREENE, *In re.* WHITWORTH, *In re.* E. A., *In re.* FRASER, *In re.* WOOD, *In re.*

diminution of the trust fund and to pay over the amounts in such manner as his daughter might in writing direct. From and after the decease of his said daughter the testator directed his trustees to hold the principal and income of the residuary trust funds In trust (subject to payment of an annuity of 1000*l.*) for all or such one or more exclusively of the other or others of the children or remoter issue of his said daughter at such age or ages and in such shares if more than one and in such manner as his said daughter should by deed or deeds with or without power of revocation and new appointment or by her will or codicil appoint and in default of and subject to any such appointment or appointments upon trust to raise 15,000*l.* for the benefit of each younger child of his said daughter and subject thereto upon trust as to an estate known as the Grove Estate for the eldest or only son of his said daughter who should attain the age of twenty-one years and as to certain other lands for the eldest and only daughter of his said daughter who should attain that age and as to all the remainder of his said real and personal estate In trust for the children of his said daughter who being male attained twenty-one years of age or being female attained that age or married.

Henry David Greene died on October 11, 1915, and there was issue of his marriage with Mrs. Greene three children only—namely, Hilda Rowland Blyth Greene, who was born on September 27, 1880, and died on December 14, 1898, a spinster; the above mentioned Rowland Henry Blyth Greene, who was born on December 22, 1881; and the above mentioned Winifred Harriet Blyth Greene, who was born on December 30, 1883.

Rowland Henry Blyth Greene was by an inquisition in 1902 and Winifred Harriet Blyth Greene was by an inquisition in 1910 certified to be of unsound mind, and Mrs. Greene was appointed their committee. They had remained of unsound mind ever since and were never expected to recover. Neither of them had ever made a will, and (apart from their mother) their nearest relation was a paternal aunt, Catherine Greene, who was a spinster of eighty-two years of age and

of unsound mind. They had no other relations nearer than second cousins.

The funds subject to the trusts of the marriage settlement were now of the value of some 49,000*l.*, of which 38,700*l.* represented funds settled by Mrs. Greene originally or under her covenant to settle after acquired property. The value of the real and personal estate passing under the will of John Jones was about 284,900*l.*, after deducting death duties.

Mrs. Greene had paid sums into Court to the credit of her children, which she had provided out of her own property and other investments standing in the names of the children and their parents or of the parents alone which had been provided by Mrs. Greene were held on trust for the children. These (with legacies of 1000*l.* to each child, given by the will of John Jones) amounted, when valued in December, 1927, to 12,640*l.* in the case of the son and 10,500*l.* in the case of the daughter, so that the total sum so provided by Mrs. Greene out of her own property amounted to 21,140*l.* The income of these funds amounted in each case to about 430*l.* per annum, and she was in the habit of making up out of her own income the difference between these respective sums and the total amounts required for their maintenance, amounting to about 900*l.* per annum in each case.

By a deed poll dated July 30, 1927, Mrs. Greene in exercise of the power of appointment contained in John Jones' will, made a revocable appointment of all the real estate to trustees upon trust for sale and to hold the proceeds of sale and the personal estate upon trust for the two children in equal shares.

In these circumstance Mrs. Greene took out two summonses under the Lunacy Act, 1890, and amending Acts, asking that under s. 171 of the Law of Property Act, 1925, a settlement might be directed of all the estate and interest present and future of each child under (*a*) the will of John Jones and (*b*) the said marriage settlement or any appointment made or to be made in favour of him or her under any power of appointment conferred on the applicant by either document (other than any property which would devolve on the death of

C. A. 1928

GREENE, *In re.*
WHITWORTH, *In re.*
E. A., *In re.*
FRASER, *In re.*
WOOD, *In re.*

such child as real estate) and that there should be inserted in such settlements (subject to proper provision being made for such child during the remainder of his or her life) a trust for the applicant her executors administrators or assigns or (in the alternative) a general power of appointment exercisable by the applicant by deed or will in respect of the whole or (in the alternative) a moiety of the capital comprised in such settlement or (in the further alternative) that such settlement might contain such trusts powers and provisions in favour of such child and the applicant as the Court might deem expedient.

Subsequently the summonses were amended so as to apply only to personal estate, and before the cases came on for hearing an arrangement was come to between Mrs. Greene and the Crown, subject to the consent of the Court, that a settlement should be made of her two children's interests under the marriage settlement giving her a general power of appointment by will over the settled funds subject to provision for the children thereout during their lives, and that in respect of the sum of 21,140*l.* she should be given a like power of appointment over the children's interests in the property settled by John Jones' will, but that she should abandon any claim for a settlement in respect of the remainder of their interests and in property settled by that will, and should undertake to maintain the children as heretofore by supplementing the income of the funds provided out of her own money during her life.

G. B. Hurst K.C., *Wilfrid Greene K.C.* and *W. M. Hunt* for the applicant. The jurisdiction of the Court to make settlements of the two children's interests arises under the Law of Property Act, 1925, s. 171, but the applicant could, as regards the sum of 21,140*l.*, have applied for its recoupment under the Lunacy Act, 1890, s. 117. Under s. 171 there is no jurisdiction to order capital to be handed over during the life of a lunatic, but it is submitted that Mrs. Greene should be given a general power of appointment, to take effect after the children's death over the whole of the settlement funds

and over their interests under her father's will to the extent of 21,140*l.* The applicant accepts the position that the Court will not allow any interference with the capital during the lives of the children, but there is no reason why she should not also have an effective power over the surplus income. It is suggested that a strong moral claim would be defeated if the settlement funds, which in the main have been provided by her, should not return to her. They would do so if she survived her two children. The result of the children being lunatics is substantially that the gifts to them fail, except to the extent of life interests. To the extent that they failed the funds supplied by the applicant would result to her and the funds supplied by her husband would result to him. Under her husband's will she is the sole beneficiary. Therefore, if the settlement were to be regarded as pro tanto failing the applicant would take the whole of the funds on the children's deaths. It is suggested that this affords a good ground for making a settlement of the children's interests under s. 171, sub-s. 1 (*b*), that will give the applicant a power of disposition over them to the extent already mentioned. Sect. 171, sub-s. 1 (*c*), is also applicable. The applicant would suffer an injustice if the property were allowed to devolve on the Crown. It is true that when the Crown has received property as bona vacantia it has generally provided to some extent and as a matter of grace for dependants. That is recognized and kept alive by the Administration of Estates Act, 1925, s. 46, sub-s. 1 (vi.). It is submitted, however, that this is a case where the Court will direct settlements of the children's interests under the settlement by which the applicant will receive a general power of appointment over the children's interests after their deaths and over surplus income accumulating during their lives, in case they survive the applicant.

The position as to the sum of 21,140*l.* is rather different. Under the will of the applicant's father the applicant had power to direct the trustees of her father's will to pay over a sum of 10,000*l.* for the benefit of each child. Instead of doing that the applicant has found money for them out of her own property. Further, as already pointed out, she could apply

C. A. 1928

GREENE, *In re.*
WHITWORTH, *In re.*
E. A., *In re.*
FRASER, *In re.*
WOOD, *In re.*

for recoupment under s. 117 of the Lunacy Act, 1890, and have the children's property charged with the amount she has provided for their maintenance. As she could obtain this under s. 117 it is suggested that the Court will be willing to give something less on this application—namely, a general power of appointment over the children's interests under her father's will to the extent of the sum she has found.

The word "injustice," when it occurs in s. 171, sub-s. 1 (*c*), has been defined as something "importing a sense of grievance" or of "unfairness": *In re Freeman.* (1) In this sense it applies to the present case. It would be unfair and give a sense of grievance that money settled by the applicant should not return to her to the extent she asks on what is in effect a partial failure of the trusts created. The applicant is desirous of making appointments for the benefit of charities in Salop in which the family has always been interested. It has always been the practice in lunacy to make allowances for relatives of a lunatic, and in doing this the lunacy authorities have had regard to what the lunatic would probably have done had he been in a position to decide: *Ex parte Whitbread.* (2) Here the applicant's children would naturally wish to benefit these charities if they were able to decide.

Sir Thomas Inskip S.-G. and *Stafford Crossman* for the Crown. It is hoped that the Court will be able to give effect to the arrangement come to, but the Court would naturally desire assistance on the construction of the section. The discretion of the Court in making a settlement under s. 171 must be limited by regard to the fact that under the Administration of Estates Act, 1925, s. 46, the Crown is given an interest in intestates' estates in default of a smaller class of next of kin than heretofore, and that the same section keeps alive the Crown's power to be generous to dependants when property devolves on it as bona vacantia. This shows that the Court has not an unfettered discretion in making a settlement of a lunatic's property so as to defeat the Crown's rights. It follows that the Court must place some reasonable

(1) [1927] 1 Ch. 479, 487, 493. (2) (1816) 2 Mer. 99, 102.

limit on its powers, although the Court is in this respect given power by s. 171, sub-s. 1 (*c*), to settle a lunatic's property so as to remedy an injustice caused by the change in the law of intestacy. In the present case it is difficult to see how cl. (*c*) can apply. If the applicant survives the children she takes their property absolutely, and if she fails to survive them it is difficult to see how she can suffer an injustice by not having power to dispose of their property. Nor is it clear that s. 171, sub-s. 1 (*b*), applies. But in any case, there are wide general words at the commencement of the sub-section which apply. The arrangement come to is thought to be fairly for the benefit of the lunatics, having regard to the condition imposed that the applicant continues to maintain them during her lifetime. It may be that the advantage received by the applicant will exceed in monetary value that given to the lunatics, but it is thought a reasonable arrangement, especially as the settlement funds were in the main found by her. It is suggested that the further term should be exacted from the applicant that she should retain the power of revocation reserved in the appointment of July 30, 1927.

Hurst K.C. in reply. The suggestion that no injustice would be suffered in the present case is contrary to *In re Freeman*. (1)

Cur. adv. vult.

In re SARAH HANNAH WHITWORTH.

The applicant in this case was Mrs. Fanny Beaven, a widow, aged eighty-one years, and first cousin once removed of the patient.

On March 21, 1865, the parents of the patient were married. On December 16, 1865, the father died. On January 26, 1865, the patient was born, and was therefore sixty-two years of age. On January 18, 1896, a reception order was made, under which the patient was detained in a mental hospital, where she still remained.

(1) [1927] 1 Ch. 479, 494.

C. A.
1928
GREENE, *In re.*
WHITWORTH, *In re.*
E. A., *In re.*
FRASER, *In re.*
WOOD, *In re.*

The mother, Sarah Whitworth, maintained the patient out of a fund to which she was entitled as tenant for life under the will of her aunt, Mrs. Rushworth, of which she and one Taylor were the trustees.

In November, 1904, Taylor died, and it then came to the knowledge of her family and others that Sarah Whitworth was unable to manage her affairs, and thereupon the applicant and her husband and other relatives undertook the management of them. In February, 1906, the applicant applied to the Court, and on March 2, 1906, one Bairstow was appointed receiver of the patient's estate.

In May, 1906, an inquisition was made as to the mental state of Sarah Whitworth, and on May 11, 1906, she was found to be of unsound mind.

On August 7, 1906, G. P. Appleyard was appointed committee of her person and Bairstow receiver of her estate.

On September 11, 1906, Sarah Whitworth died, and thereupon the property devolved upon the patient. This consisted of a life interest in the Mary Rushworth trust funds, 11,000*l.* to which she was entitled absolutely under her grandmother's will, and property belonging to her mother.

Bairstow took out letters of administration to the various estates. The personalty derived by the patient from the estates of her mother and grandmother were realized, and the proceeds, amounting to about 20,000*l.*, were paid into Court.

In 1909 Bairstow requested to be remunerated for the work done by him as receiver, and the trustee allowed him a payment of £50 a year. He however refused to accept this sum as sufficient and refused to act, and thereupon on December 2, 1909, he was removed, and the official solicitor was appointed to act as receiver in his place and had since continued so to act.

The only near relatives of the patient in addition to the applicant were her two first cousins, Mary Mitjams, a spinster, born in 1847, and Catherine Sarah Uriburn, born in 1850, who were, and always had been, resident in South America.

In the affidavit in support of her application the applicant submitted that by reason of her own great age and that of her cousins in South America "any settlement which the Court might be pleased to direct would not be of any material benefit to the patient's nearest of kin unless its scope were extended to include the children of any deceased first cousins of the patient's mother."

W. G. Hart for the applicant. It is submitted that the present case falls within s. 171, sub-s. 1 (*b*) and (*c*). As the patient has never made a will it cannot be said that the applicant had an expectation under it, but it is submitted she had a spes successionis in 1925, when the Administration of Estates Act, 1925, was passed. The case is therefore a proper one for the exercise by the Court of its discretion under s. 171. Sect. 51, sub-s. 2, of the Administration of Estates Act, 1925, which provides for the protection of the heir at law in the case of realty affords some indication of the intention of the Legislature as to personalty. The meaning of the words "suffer an injustice" in s. 171 was considered in *In re Freeman*. (1) Here there are a number of persons who, but for the change in the law, would have had a reasonable expectation of being benefited and who therefore think there has been some unfairness.

[SARGANT L.J. They did not help the patient in distress in the ordinary sense.]

The persons who did interest themselves are all dead, but their descendants ought to have the benefit of their labours. The applicant is willing that all persons interested in the same degree should benefit with her. The husband and son of the applicant are the persons who have taken the most interest in the care of the patient's property, as they have acted successively as trustees of the Rushworth trust.

Winterbotham for the receiver left the matter in the hands of the Court.

Sir Thomas Inskip S.-G. and *Stafford Crossman* for the Crown were not called upon to argue.

Cur. adv. vult.

(1) [1927] 1 Ch. 479, 487, 490, 493.

C. A.
1928
GREENE, *In re.*
WHITWORTH *In re.*
E. A., *In re.*
FRASER, *In re.*
WOOD, *In re.*

In re E. A.

In this case the patient, who was eighty years of age, had made a will, dated in 1887, by which he had disposed of his residuary estate equally between his wife and children as a class. The daughter's shares were settled, but those of the sons were given to them absolutely. At the date of his will the patient had a wife, two sons and two daughters. One of the sons died in 1920, leaving children. The wife was also dead. The two daughters had both married and were living. The surviving son was married and had issue.

The patient became of unsound mind a few years ago, and the applicant, the surviving son, had been appointed receiver of his estate.

The facts are more fully stated in the judgment of the Master of the Rolls.

Cleveland-Stevens for the applicant. The gift to the children being a class gift the gift to the deceased son will fail if the will stands as it does. The patient's family are desirous that the deceased son's issue shall be in no worse position than they would have been if their father had survived the patient.

Cur. adv. vult.

In re CHARLES RICHARD MATHEWS FRASER.

In this case the application was made under s. 171. sub-s. 1 (*b*), with the object of excluding the father of the patient and his family.

The property of the patient was derived under the will of his maternal grandfather, Richard Mathews. Richard Mathews made two wills dealing with his realty and personalty respectively. Under those wills the mother of the patient took one-third of the property absolutely, which she settled on her marriage. In exercise of a general power of appointment given her by the settlement she appointed to her son the patient.

The father was a very unsatisfactory person, and was in 1877 divorced by the mother and had not since been heard of.

The facts are more fully stated in the judgment of the Master of the Rolls.

A. F. Topham K.C. and *McMullan* for the applicants. In this case the property came to the patient from his mother's family, and it would be very hard that it should go to persons on his father's side who never had anything to do with the patient as the applicants have. The Court is entitled under sub-s. 1 (*b*) to consider from which side of the family the property comes.

If the test to be applied is what would the patient have done if he had been of sound mind it is clear that he would not have left anything to his father's family.

Cur. adv. vult.

In re ROBERT JAMES WOOD.

In this case Mrs. Wood, the wife of the patient, applied for a settlement under s. 171.

On September 28, 1912, the patient was married to the applicant. On March 12, 1922, the patient, who was a solicitor's clerk, drew up his own will, leaving the whole of his property to the applicant if she survived him. The will was typed by a clerk in the office of solicitors by whom the patient was employed, and was witnessed by two of the patient's friends, Mr. and Mrs. Hulley. The will was deposited in 1923 with the patient's employers. The will could not now be found and no draft of it was in existence.

The patient subsequently became of unsound mind. On April 2, 1925, the applicant was appointed receiver of his estate, and on November 11, 1926, the official solicitor was appointed receiver in her place.

The property of the applicant consisted of freeholds valued at 1600*l.*, subject to mortgages for 670*l.* = 930*l.*, and leaseholds valued at 1800*l.* less 188*l.* = 1612*l.*

The only relations of the patient were his father and two brothers.

Winterbotham for the applicant suggested that difficulties would arise on the death of the patient if the matter was not

C. A. 1928 — GREENE, *In re.* WHITWORTH, *In re.* E. A., *In re.* FRASER, *In re.* WOOD, *In re.*

now dealt with. There was a doubt as to what the wife would take. The case was reasonably within sub-s. 1 (*c*) of s. 171, there having been a change in circumstances owing to the loss of the will.

[LORD HANWORTH M.R. I should prefer to put my judgment on the special reason rather than on change in circumstances.]

The form of settlement was then discussed.

Cur. adv. vult.

March 23. The following judgments were delivered :—

LORD HANWORTH M.R.

In re ROWLAND HENRY BLYTH GREENE.
In re WINIFRED HARRIET BLYTH GREENE.

These summonses were taken out by Mrs. Harriet Rowland Greene, a widow, residing at the Grove, Craven Arms, in the county of Salop, asking that under s. 171 of the Law of Property Act, 1925, settlements may be directed of all the estates and interests, present and future, of the above named patients, respectively, under or by virtue of (*a*) the last will of John Jones deceased (the maternal grandfather of the patients) and (*b*) the settlement dated October 16, 1879, made on the marriage of the parents of the patients, or of any appointment made, or to be made in favour of the patients under powers of appointment conferred on the applicant by either of such documents, other than any property which would devolve on the death of the patients as real estate, together with further consequential or alternative relief.

Mrs. Greene, the applicant, is the only child of her parents, John Jones, who died on May 10, 1885, and his wife, Mary Ann Jones, who died on May 26, 1885. Under the terms of her father's will, Mrs. Greene became entitled to very considerable property. Mrs. Greene was married on October 18, 1879, to Henry David Greene, who died on October 11, 1915, and the settlement referred to in the summonses is that which was effected in contemplation of

the marriage that was solemnized two days after it had been executed. There were three children of the marriage. The eldest, Hilda, was born in 1880, and died before being married or reaching the age of twenty-one. The second, Rowland, was born on December 22, 1881, and the third, Winifred, was born on December 30, 1883. By inquisitions in 1902 and 1910 they were respectively certified to be of unsound mind, and in each case the applicant was appointed committee of their persons and estates. These two persons are the patients referred to in the summonses. They have respectively reached the ages of forty-six and forty-four years, and there is no prospect of the recovery of either of them. These children of the marriage of Mr. H. D. and Mrs. Greene have no relations nearer than second cousins, except their mother, the applicant, and their paternal aunt, Catherine Greene, spinster, who is eighty-two years old and also certified as of unsound mind; thus their mother is their only capable relative.

By the marriage settlement of October 16, 1879, Mrs. Greene settled certain investments specified in the first schedule, and provision was made for the settlement of after acquired property during coverture. Her husband settled the investments specified in the second schedule.

In the events which have happened, the value of the wife's settled funds is now about 38,700*l.* and the husband's about 10,300*l.*, and the gross income of the total funds together is about 3400*l.* per annum. Mrs. Greene is entitled to the whole of this income during the rest of her life, and she has a power of appointment exercisable by deed, or will, among the issue of the marriage; and subject to her life interest and power of appointment, and a provision for hotchpot, the funds are settled in trust for the above two surviving children in equal shares. The ultimate trusts in default of issue were as to the husband's trust fund for Mr. H. D. Greene, and as to the wife's trust fund in the events which happened for Mrs. Greene. The joint power of appointment conferred by the settlement upon her and her husband was not exercised, and so far Mrs. Greene has not exercised her power of

C. A. 1928

GREENE, *In re.* WHITWORTH, *In re.* E. A., *In re.* FRASER, *In re.* WOOD, *In re.*

Lord Hanworth, M.R.

appointment as survivor. By his will Mr. H. D. Greene left the whole of his estate to his wife absolutely.

Probate of the will and codicil of Mrs. Greene's father, John Jones, was granted on July 15, 1885. In the events which have happened, the beneficial trusts affecting his net residuary estate are that Mrs. Greene is entitled to the whole of the income for her life, and that she has a power of appointment exercisable by deed or will among her issue; and, that, subject to such life interest and power of appointment, and a hotchpot clause, the estate is settled in the following manner: (*a*) First 15,000*l.* is to be raised and paid to or for the benefit of each child except the eldest or only son. (*b*) As to the Grove Estate in trust for the patient Rowland Greene, the son, in fee simple. (*c*) As to the estate in Hope in the county of Flint, which is known as Rhyddyn, and other lands mentioned, or the moneys or investments representing the same if sold, in trust for the daughter in fee simple. (*d*) Subject as aforesaid all in trust for the two patients equally. If no child had attained a vested interest in the said residuary estate the said will conferred on Mrs. Greene a general power of appointment by will over the whole estate.

The Grove Estate comprises a mansion house and grounds covering about 30 acres and about 2856 acres of farms and 482 acres of woodlands, and the whole is of the gross value of about 155,300*l.*

The estate at Hope, and other lands mentioned in conjunction therewith, comprises about 90 acres, and is of the gross value of about 5400*l.*

The remainder of the residuary estate is of the value of about 235,000*l.* Consequently the aggregate residuary estate is of the net value of about 284,900*l.* after deducting death duties.

On Mrs. Greene's death estate duty will be payable in respect of the whole of the funds in her said marriage settlement and of John Jones's residuary estate (except and so far as she were to release her life interest more than three years before her death), and it is calculated that the rate of such

duty will be 28 per cent.; but allowing for such duty the two patients between them will ultimately succeed under such marriage settlement and will to about 321,600*l.* net. In addition to the funds aforesaid the two patients on the death of their said paternal aunt Catherine Greene will succeed to part of her property which is considerable, and the portion thereof passing to the two patients will probably be about 18,000*l.* So far as is known and believed this lady has not made any will, and there is no chance of her recovery. Neither of the patients has made any will, or is capable of making an effectual will, and the result is that each of them will die intestate. The probability is that both of them will survive their said aunt and Mrs. Greene; and in that event, on the death of the survivor of them the whole property of both of them will pass to the Crown. The aunt, Catherine Greene, has no near relation other than the two patients, and her next nearest relations are not nearer than second cousins.

Mrs. Greene resides at the mansion house on the Grove Estate and looks after and keeps up the estate, where the patients also stay occasionally, but they reside under the care of persons approved by the Master in Lunacy.

Mrs. Greene's said powers of appointment among issue under her said marriage settlement and her father's will are still exercisable, and by an exercise of such powers she can exclude one of the patients from taking any share. Except for the portion of the marriage settlement funds settled by her husband the whole of the funds thereby settled were settled by Mrs. Greene. As to the residuary estate of her father the whole was settled by her father, and when he made his will and codicil it was not known that the two patients were otherwise than normal, as they were then only two and a half years and four months old respectively. If he had known that they were not normal, it may be, and indeed it is probable, that after providing ample income for their maintenance and benefit for life he would have given Mrs. Greene a general power of appointment over the whole of the estate, just as he did in case she had no issue who should take vested interests.

C. A.
1928
GREENE, *In re.*
WHITWORTH, *In re.*
E. A., *In re.*
FRASER, *In re.*
WOOD, *In re.*
Lord Hanworth, M.R.

The applicant is anxious to have a power of appointment over the property settled by the marriage settlement and will, subject to adequate provision being made for the two patients, in order that she may be able to make provision for various persons, friends of her own and of her husband, for the domestic servants and employees on the Grove Estate, and for various charities. These applications have been, by amendment, limited to personal property, and Mrs. Greene, by deed poll dated July 30, 1927, made a revocable appointment under the will of her father appointing all the real estate comprised therein upon trust for sale, and directing the proceeds and the residuary personal estate to be held in trust for the two patients in equal shares. The applicant would thus, if she survived the patients, take as next of kin the whole of the property passing under the settlement and the will. If, however, as seems probable, the patients survive Mrs. Greene and the paternal aunt, then on the death of one patient his or her property would pass to the other, and on the death of the survivor the whole would pass to the Crown.

The jurisdiction that is entrusted to the Court by s. 171 of the Law of Property Act, 1925, is a novel one. One of the particular cases in which a settlement may be directed by the Court is: "Where by reason of any change in the law of intestacy . . . . any person might suffer an injustice": see s. 171, sub-s. 1 (*c*).

The change in the law of intestacy was effected by s. 46 of the Administration of Estates Act, 1925. Both these Acts received the royal assent on the same day. It is plain that the intention of the Legislature was to give power to the Court to act under s. 171, where, in its discretion, it thinks it is wise or necessary to do so in the interest of those whose rights have been affected by the new law of intestacy. In other words, it cannot be claimed that the rights of the Crown under s. 46 ought not, in proper cases, to be modified or defeated, for it was recognized that there might be considerations to be taken into account before the property should be allowed to pass to the Crown. Sub-s. 1 (vi.) of

s. 46 of the Administration of Estates Act, which gives power to the Crown to provide "in accordance with the existing practice, for dependants . . . . and other persons for whom the intestate might reasonably have been expected to make provision," confirms this view.

Next it must be remembered that there is already, under s. 117 of the Lunacy Act, 1890, power to deal with the property of a lunatic for the purposes therein defined, which include "payment of any debt or expenditure incurred for the lunatic's maintenance or otherwise for his benefit." Sect. 171, therefore, must not be construed narrowly as giving powers to be exercised only in the interest of the lunatic, or as discharging his obligations; but also as including the interests of those for whom the intestate might reasonably have been expected to make provision, and those who might suffer an injustice in the sense given to those words in *In re Freeman*. (1) I adhere to what I have said there (2) as to the unwisdom of attempting an exhaustive exposition of s. 171. Its scope must be determined by the illustrations provided by the cases decided under it. I turn, therefore, to the facts of the present case. If the patients had not been afflicted, the property which is the subject of the present application would have passed away from any control by Mrs. Greene, except as to the division of it between her two children. But it is argued that if they had died before reaching the age of twenty-one, and in the case of the daughter so dying unmarried, the whole estate of her father would have returned to Mrs. Greene's control; and that the absence of any provision in John Jones' will in case of the lunacy of the grandchildren is sufficiently explained by their tender years at the date of his will, which was made only just over twelve months before his death. These considerations would appear to have the greatest weight if the duty imposed upon the Court had been to override the uncertainties of life, and to restore and make good the effect of misfortunes which might have been prevented by greater and longer foresight. That, however, is not the

(1) [1927] 1 Ch. 479. (2) [1927] 1 Ch. 488.

C. A. 1928

GREENE, *In re.*
WHITWORTH, *In re.*
E. A., *In re.*
FRASER, *In re.*
WOOD, *In re.*

Lord Hanworth, M.R.

case. Under s. 171, sub-s. 1 (*c*), the question is whether, for any of the various reasons included in that clause, an injustice might be suffered if the property were allowed to devolve as undisposed of on the death intestate of the lunatics. There seems no such injustice in the present case, for if all had gone as directed the property would have passed away from Mrs. Greene, and none of the persons or objects for whose benefit these applications are made would have had any spes successionis. I find a great difficulty in acceding to any application as to the estate of John Jones, however deeply one's sympathy may be aroused on behalf of the applicant.

There remains the general power to make a settlement indicated under sub-s. 1 (*b*): "Where the property has been acquired under a settlement, a will or an intestacy." There are no facts in the present case showing an actual present hardship to the applicant. She is in possession of, and will receive during her life, all the provision that was intended for her by her father and her husband. I can find no grounds on which it ought to be deemed expedient to vary the terms of the will and settlement carefully drawn to meet the usual contingencies. There is no hardship or wrong to any other member of the family.

It has been argued, however, that if the patients had been of sound capacity they would have undertaken some of the responsibilities towards the friends of the family, and the residents and charities in the parish and district and county which Mrs. Greene has fulfilled, and is anxious to provide for. So that in the light of existing circumstances the settlement might be looked at as if the resulting trust in favour of Mrs. H. D. Greene had taken effect. I have some difficulty in accepting this argument; but counsel for the Crown do not oppose it. It may be that in the course of looking for a sure foundation for action under the section, and for guidance as to the limits within which the discretion is to be exercised, there is a danger of giving too small an effect to s. 171, which is so drawn as to afford a large discretion to the Court. While, therefore, I cannot regard this decision as a precedent, I am prepared to accede to the

proposal that a settlement should be drawn up whereby both the funds brought into the settlement of October 16, 1879, should be made subject to a power of disposal by Mrs. Greene upon her death. I am not disposed to go further, or to make any order in respect of the 21,000*l.* provided for the patients by Mrs. H. D. Greene. At the time when the sums comprising this total were transferred Mrs. Greene was well aware of the condition and prospects of the patients, and of her own position. The facts as to this total sum do not appear to make any ground for intervention under s. 171. Equally, I disregard any claim based upon the expenditure involved in keeping up the Grove, and the estate generally. Such an outlay would fall upon the occupier in ordinary course, and is part of the expense that the enjoyment of the property entails. It would not have been reimbursed to Mrs. Greene if her children had not been afflicted.

In coming to the conclusion stated as to these summonses I desire to say that Mrs. Greene is not to be taken to have abandoned or forfeited her right to apply under s. 117 of the Lunacy Act, 1890, if she is advised to do so. I express no opinion upon such an application, except to point out that this judgment does not cover, or interfere with, any claim made under that section.

The order, therefore, will be that a settlement be made in the amended terms proposed, and the details will, of course, be worked out, and submitted to the Master.

In re SARAH HANNAH WHITWORTH.

The summons in this case was taken out by Fanny Beaven, a widow, asking for a settlement to be made of the property of the patient, whose mother was a first cousin of the applicant. The patient is thus the first cousin once removed of the applicant. She was found of unsound mind by an inquisition on May 11, 1906. The applicant was born in 1847, so that her age is now eighty-one years, and she is prepared to allow her first cousins, Mary Mitjams, a spinster, who was also born in 1847, and Catherine Sarah Uriburn, born in 1850,

C. A. 1928 GREENE, *In re.* WHITWORTH, *In re.* E. A., *In re.* FRASER, *In re.* WOOD, *In re.* Lord Hanworth, M.R.

to share with her in any order that might be made by the Court. These cousins are now, and appear to have been always, resident in South America.

The facts of the case are set out in an affidavit sworn by Mrs. Beaven; and from that, as explained by a pedigree and table of affinity put before the Court, there appears to be no valid grounds for the application now made. There are no special services rendered to the patient by the applicant, whose husband appears to have paid some attention, incidentally, to the affairs of the patient in the course of his acting as a trustee of estates under which the patient has benefited: but there is no proof of close association with, or direct care for, the patient such as obtained in *Freeman's* case. (1)

At the end of the affidavit of the applicant a submission is made that having regard to her own great age and that of her cousins in South America, "any settlement which the Court might be pleased to direct would not be of any material benefit to the patient's nearest of kin unless its scope were extended to include the children of any deceased first cousins of the patient's mother."

The application is, therefore, one to secure that the second cousins of the patient may receive a benefit under a settlement to be ordered by the Court.

By s. 46 of the Administration of Estates Act, 1925, the rights of second cousins are excluded. There is no ground for any interference with the effect of this section. There are no merits which the applicant can urge within s. 171 of the Law of Property Act, 1925, and this case affords a type of case in which, in my judgment, the Court ought not to interfere. The application must be dismissed with costs.

In re E. A.

In this case the patient is the founder of a prosperous brewery, and the owner of a very large number of ordinary and preference shares in the limited company which has taken over the brewery. It is a public company, but the

(1) [1927] 1 Ch. 479.

shares are largely held by the patient and his family. Unfortunately, after a successful business career, the patient's mental powers failed, and on November 24, 1924, his only surviving son was appointed receiver of his estate. The latter is the applicant by the summons now to be considered, the purpose of which is that a family arrangement may be ordered to be embodied in a settlement in order to overcome the difficulties resulting from the patient's condition.

The patient still lives at his own home under the same circumstances as he did before November, 1924, and his condition is known to few persons. If it were known, some injury might be caused to the business, and quite unnecessary publicity would be given to purely family matters. Under these circumstances the Court decided to hear the case in camera.

The patient was born in 1848, so is now eighty years old. At the time when he made his last known will—in 1887—his family consisted of his wife, who died in 1918, a son H. C., born August 19, 1880, a daughter D. M., born September 13, 1883, and the applicant, born May 12, 1885. Another daughter, V. E., was born July 19, 1891. By the terms of the will he divided his residuary estate equally between his wife and children as a class, the wife's and daughters' shares being settled.

There is evidence before the Court that some two years before he became incapable of doing so he talked of making a fresh will; and, indeed, in 1922 promised one of his relations that he would do so within a month or two, but he has failed to carry that intention into effect. His property is valued at not less than 450,000*l*., and consists of a large holding in the preference and ordinary shares in, as well as of the debentures issued by, the brewery company. The patient, with his family and nephew, to whom he has made large presents of shares, hold one half of the ordinary shares of the company.

The eldest son, H. C., died on May 10, 1920, leaving a widow and four children. The daughter, D. M., was married on September 13, 1906, to C. Y. F., and there are four children

C. A. 1928

GREENE, *In re.*
WHITWORTH, *In re.*
E. A., *In re.*
FRASER, *In re.*
WOOD, *In re.*

Lord Hanworth, M.R.

of the marriage. The youngest daughter, V. E., was married on March 14, 1917, to A. E. W., and there are two children of the marriage.

The applicant was married on December 6, 1916, and there is one child of this marriage. In his affidavit the applicant says that he is convinced that if his father had been enjoying normal health he would have divided his fortune equally amongst his children, and that if one of them had died in his lifetime, leaving issue, the issue would have taken between them the share of their father or mother, and also that he would have had due regard to the future of the company, and his interests in it, by giving his trustees the usual provisions whereby his interests might be retained for the benefit of his family and a forced sale avoided. The view thus presented appears to accord with the facts of the case. The patient had a warm affection for the members of his family. It is clear that if matters are left as they are without a fresh will having been made, "injustice" will be caused to the children of his deceased eldest son, and serious inconvenience may be caused to the company.

It seems to be a plain case for the intervention of the Court "by reason of the change in circumstances since the execution, etc., of a testamentary disposition." The application is concurred in by all the persons who would take under the will as it stands; and we, therefore, direct a settlement to be made of the patient's property on the lines and for the purposes indicated by the applicant. The details will be settled by the Master. There will be an ample provision made for the patient to continue his life as at present, and the order will provide that the stamp duty on the settlement be paid out of the accumulations in the receiver's hands.

In re CHARLES RICHARD MATHEWS FRASER.

This application is made by Hectoria Ricardo Nanny Mathews Hunter and her husband James Harper Hunter, who are the committees of the person and estate of the patient, appointed by an order dated September 6, 1927.

The patient for many years resided with Mrs. Hunter, both when she was, as formerly, the wife of William Phayre Ryall, and he continues to reside with her, now that after the death of Mr. Ryall she has married again. The patient's mother, Caroline Eleanor Mathews, was married on July 14, 1866, to his father, Charles Fraser, who was not possessed of any private means and only had his pay as a subaltern in the Army, and there were two children of the marriage —namely, the patient and a sister, Eleanor Caroline Mathews Fraser, who died a spinster and intestate on December 2, 1903.

Charles Fraser deserted his wife and family at a time previously to the year 1875, went to South Africa, and never returned here. In 1877, on the petition of the patient's mother, her marriage with Charles Fraser was dissolved, and nothing is known about him at the present time. The patient's mother died on December 22, 1896.

The applicant, Mrs. Hunter, is a first cousin of the patient. So far as is known she and her children and the children of her late sister, Mrs. Robinson (who died in 1927), are the only relatives of the patient on his mother's side; and also, so far as is known, there are no relatives of the patient on his father's side.

The patient is entitled to considerable property derived from his maternal grandfather through a settlement made by his mother, and also under the latter's will and as her heir at law.

If no settlement were directed difficulties might be experienced in administering the patient's estate upon his death in view of the possible claim by some relative on his father's side. In view of the fact that his father disappeared over fifty years ago and has never taken any interest or care of the patient—was not a contributor to the property of the patient of which a settlement is sought—it seems right that the application should be treated as falling within the powers of the Court under s. 171, sub-s. 1 (*b*), and that a settlement should be made securing to those relatives on his mother's side, who would take if there were a complete failure of those

C. A. 1928

GREENE, *In re.*
WHITWORTH, *In re.*
E. A., *In re.*
FRASER, *In re.*
WOOD, *In re.*

Lord Hanworth, M.R.

on the father's side, and living at his decease, the property of which he is possessed.

Accordingly we direct that such a settlement be made in terms to be settled by the Master, and the costs of it will be provided for as in ordinary course.

In re ROBERT JAMES WOOD.

In this case the Court is asked to make good the loss of a will known to have been executed by the patient.

The patient was married on September 28, 1912, but there are no children of the marriage; and he made a will dated March 12, 1922, which was witnessed by Percival Alfred Hulley, the deponent to an affidavit now before us, and Mrs. Hulley, his wife. These witnesses are also able to speak to the terms of the will, which gave all his estate to the patient's wife absolutely, and it also provided that in the event of the death of himself and his wife together by accident, or if his wife survived him for a short time only and failed to make a will, the estate should be divided between his brothers. It was expressed in the simplest terms, and appointed his wife and a solicitor the executrix and executor. This will was lodged with the firm of solicitors of which the executor, so appointed, was a member. He has since died—on October 6, 1924. The will is not now forthcoming, and the evidence satisfies the Court that it has been lost.

On April 2, 1925, the wife of the patient was appointed receiver. It appears to the Court that there are "special reasons" within s. 171, sub-s. 1 (*c*), why a settlement of the patient's property should be executed to carry out the purposes of the lost will.

We give directions accordingly, and the details of the settlement will be settled by the Master.

SARGANT L.J.

In re ROWLAND HENRY BLYTH GREENE.
In re WINIFRED HARRIET BLYTH GREENE.

These applications affect or involve the considerations of the interests of the two patients (brother and sister) in

funds which may be shortly classified under three heads—namely, first, funds representing the real estate as converted into personalty and the residuary personal estate of the patients' maternal grandfather John Jones; secondly, funds held under the trusts of the settlement effected on the marriage of the father and mother of the patients; and thirdly, funds (almost entirely in Court) which have from time to time been transferred by the mother of the patients for the benefit of each of the patients separately. The first mentioned funds may be roughly estimated as of a present value of 400,000*l.*, and each of the patients is entitled to a reversionary interest in a moiety of these funds, subject to the life interest of their mother, and subject to a power of revocation by her which she proposes to release. The secondly mentioned funds are of the value of about 50,000*l.*, of which some 40,000*l.* was settled by the mother of the patients, and about 10,000*l.* was settled by the father of the patients; each of the patients is entitled to a moiety of these settled funds subject to the life interest of their mother and to any appointment by her between them. The thirdly mentioned funds are, as regards the patient Rowland H. B. Greene, of the value of some 12,600*l.*, and, as regards the patient Winifred H. B. Greene, of the value of some 10,500*l.*; in each case these funds belong to the patient absolutely in possession.

The patients are some forty-six and forty-four years of age respectively. Each has been of unsound mind for many years and has no prospect of recovery. Neither has been married or has (so far as is known) made a will or has been ever capable of making a will. Neither has any relative nearer than second cousins, except (1.) the applicant; (2.) the other patient; and (3.) a paternal aunt Catherine Greene, spinster, who is some eighty-two years of age, is herself certified as of unsound mind, and has no prospect of recovery. Accordingly, any settlement that might be directed by the Court of the property of either patient on the application of their mother would not have any practical operation against the rights of any one except the Crown. And this being so, the Crown is the only party on whom the applications have

C. A. 1928

GREENE, *In re.* WHITWORTH, *In re.* E. A., *In re.* FRASER, *In re.* WOOD, *In re.*

Sargant L.J.

been served. The applications in terms purport to deal with the interests of the patients in the first and secondly mentioned funds only. But the thirdly mentioned funds have also to be taken into consideration, because of the suggestion hereinafter mentioned, that the extent to which the first mentioned funds should be settled in favour of the applicant should in the case of each patient be measured by the amount of the fund which the applicant has herself provided for that patient.

The applications are not based on there having been any change in the law of intestacy under the first words of sub-s. 1 (*c*) of s. 171 of the Law of Property Act, 1925; for the applicant is, of course, not affected by that change. They are put forward on the ground of the interests of the patients in the will funds and the settlement funds having been acquired under the will and the settlement respectively, and of the indications as to intention alleged to be derivable therefrom; and also on the ground that the applicant would suffer an injustice both as to the whole of the settlement funds and also to some extent as to the will funds, were they allowed to pass as undisposed of on the deaths of the patients, or at least on the death of the survivor of the patients. It is said that as to the funds settled by each parent of the patients, neither parent would have wished in the circumstances to have made a provision for either patient beyond that patient's life; that this being so, and the patient being amply provided for out of his or her share of the will funds, the parent would suffer an injustice were such parent not allowed to dispose of the fund settled by him or her as on a resulting trust; and that the applicant having succeeded to her late husband's position as residuary legatee under his will, she ought now to be placed by a settlement under s. 171 in a position to deal by will with the share of each patient in the capital of the settlement funds and with the intermediate income of each share between her death and the death of each patient.

It is further urged for the applicant that, having regard to the source from which the will funds came and the various

indications in that will of the benevolent disposition of the testator to the applicant, the same sort of reasoning, though perhaps of a less cogent character, applies to the much larger will fund of 400,000*l.*, that the case in favour of the applicant is strengthened by her "expenditure of money in improving or maintaining" the Grove estate, and that she should now be given by a settlement under s. 171 large powers of disposition over the whole or a part of the will funds.

In the course of the opening of the case it was stated that terms had been provisionally arranged between the applicant and the Crown, subject to the approval of the Court, under which the Crown would assent to the applicant having some such powers of disposition by will as she sought over the whole of the settlement funds, and to her also having powers of disposition over the will funds to an extent not exceeding, in the case of each patient, the amount provided by the applicant for him or her out of her own property. But as to this last provision it was apparently not definitely agreed whether this power should or should not extend to the intermediate income of the amount in question between the death of the applicant and that of the patient, and minutes of the proposed order which have since been submitted show a divergence of view on this point. We have now to consider how far we can go in directing a settlement of the kind suggested.

As regards the proposed settlement of the marriage settlement funds, I should, apart from the acquiescence of the Crown, have felt much difficulty. The primary object of the marriage settlement was undoubtedly to provide for the spouses during their successive lives and for their children and issue after their deaths. And there has been no failure of this primary object, though through the misfortune of the death of the one normal child of the marriage under age, and of the imbecility of the two patients, there cannot be any younger generation to provide for. No doubt, had what has happened been foreseen, a power would have been inserted in the settlement under which the parents, or one of them, could have disposed of the funds as they, he or she

C. A.
1928
GREENE, *In re.*
WHITWORTH, *In re.*
E. A., *In re.*
FRASER, *In re.*
WOOD, *In re.*
Sargant L.J.

might think fit. But whether looked at from this point of view or from that of resulting trust it is only in an extended use of the term that the applicant could be said to suffer "an injustice," or even suffer a "hardship," should she not be put in a position to deal with the funds as asked. And these considerations apply more strongly to the 10,000*l.* or so originally settled by her husband than to the 40,000*l.* or so settled by herself. Inasmuch, however, as the Crown, the sole party practically interested in opposing this settlement, acquiesces in general, though not in detail, in what is suggested, and would thereby be making sure of securing the whole of the 400,000*l.* will funds, with the possible exception of amounts equivalent to those provided by the applicant for each of the patients, I think that the case is one in which we may give effect to this part of the suggested compromise and direct a settlement to be executed accordingly.

As regards the will funds the proposal seems to me very different. I cannot find here anything, even remotely, of the nature of a resulting trust; nor is it clear to me what the testator would have done had he foreseen what has in fact happened. And as regards expenditure on the Grove estate there is not shown to have been anything beyond what a well-to-do and considerate owner would naturally expend in the course of the efficient maintenance of the property while residing there as tenant for life; nor can I see what moral claim the provision by Mrs. Greene of the 12,600*l.* and 10,500*l.* respectively for the two patients can give her to have an equivalent power of disposition over the will funds. The provision was made with full knowledge of all the circumstances, and leaves no room for reconsideration, either as regards the funds so provided, or by way of charge or reimbursement in respect of the will funds. This being so, the Court ought not in my opinion to direct a settlement under which the applicant will have any power of disposition over the will funds. But though in this respect the Court declines to direct any settlement under s. 171 of the Law of Property Act, 1925, this refusal is not intended to prejudice such right

or claim as the applicant may have under s. 117 of the Lunacy Act to obtain recoupment out of the capital of the provided funds of 12,600*l.* and 10,500*l.* respectively of any past or future provision by her towards the maintenance of either patient beyond the income of the 12,600*l.* or 10,500*l.*, as the case may be. And the order to be made on each of these applications should contain words reserving any such right or claim.

In the minutes of order submitted to us an express provision was inserted for preserving the right of each patient to maintenance, if necessary, out of the income of his or her share of the marriage settlement funds in priority to the power of disposition over those funds to be given to the applicant. But this appears to be quite unnecessary and to introduce a needless complication into the proposed settlement. As matters stand, each patient will be entitled on the death of the applicant to one moiety in possession of the whole of the proceeds of the real and personal estate, subject to the will of the testator John Jones ; and it is obviously unnecessary to make or preserve any additional provision for either of them.

The order will provide that as a condition of and prior to the execution of the settlement the applicant shall execute a release of the power of revocation and new appointment reserved by the deed poll of July 30, 1927.

In re SARAH HANNAH WHITWORTH.

The patient here is a spinster and is sixty-two years of age. Her nearest of kin on her mother's side are three first cousins of her mother—namely, the applicant Fanny Beaven, a Mrs. Mitjams and Mrs. Uriburn. The applicant and Mrs. Mitjams are both over eighty years of age. It is therefore most improbable that these three persons will survive the patient and hardly probable that any of them will do so. But there are numerous descendants in existence both of the applicant and of Mrs. Uriburn and of deceased cousins of the patient's mother. It is suggested that any relations of the patient on the father's side are still more remote,

C. A.
1928
GREENE, *In re.*
WHITWORTH, *In re.*
E. A., *In re.*
FRASER, *In re.*
WOOD, *In re.*
Sargant L.J.

and the Court is asked to deal with the matter on that footing, but saving their rights, if any.

The change in the law of intestacy effected by the Administration of Estates Act, 1925, has, of course, deprived the first cousins of the patient's mother and any descendants of such first cousins of any spes successionis in relation to the personal property of the patient. The applicant is asking that a settlement should be directed of the patient's property upon such trusts as the Court may deem expedient. And the trusts suggested by counsel were trusts under which the three surviving first cousins of the patient's mother or the children of all the first cousins of the patient's mother would benefit. It is unnecessary to consider what the exact provisions of any such trusts should be. For in my judgment the case is not one in which any settlement at all should be directed.

There is obviously no sufficient reason under sub-s. 1 (*b*) of s. 171. And as regards sub-s. 1 (*c*) of the same section, it is necessary, in order to justify the direction of a settlement, that the Court should be satisfied that some person "might suffer an injustice if the property were allowed to devolve as undisposed of on the death intestate" of the patient. But, giving to the phrase "suffer an injustice" any of the extended meanings suggested in the judgments of this Court in *In re Freeman* (1), I am nevertheless of opinion that the applicant has entirely failed to show that she or the two persons in the same case as herself or the second cousins of the patient would "suffer an injustice." Such circumstances as were relied on in *In re Freeman* (1) are entirely or almost entirely lacking here. Nor are there any other sufficient circumstances. Indeed, if the present application were granted, we should come very near to repealing, in the case of the personal property of every lunatic or defective existing on January 1, 1926, the alteration in favour of the Crown effected by the Administration of Estates Act, 1925.

The Crown has very naturally opposed the application, and this opposition must prevail, though it is not actually

(1) [1927] 1 Ch. 479.

necessary to hear any argument on its behalf. The application must be refused.

In re E. A.

In this case the application for a settlement is based upon the change in circumstances since the patient, in the year 1887, executed his existing will. I agree with my Lord that there has been such a change as to make a clear case for the exercise by the Court of the jurisdiction conferred by s. 171 of the Law of Property Act, 1925, and that the main lines of the proposed settlement are proper and should be adopted. The matter is much facilitated by the fact that the immediate family of the patient are united and harmonious, and that the three surviving children of the patient, who would share his property in thirds should the existing will come into immediate operation, desire that the family of the deceased son should take the fourth share which the patient intended for him. On the other hand, each of these surviving children and their children will be safeguarded as regards their fourth shares in the estate by the gifts to him or her being saved from the danger of failure in the event of his or her death during the remainder of the life of the patient.

The case is not one in which the Crown is in any way interested.

In re CHARLES RICHARD MATHEWS FRASER.

I agree that this is a clear case for directing a settlement of the patient's property as asked—namely, so that it may pass on his death as if there were then a complete failure of any relatives on his father's side.

In re ROBERT JAMES WOOD.

The evidence as to the making of the patient's will and as to the contents of it appears to be conclusive. In the circumstances I agree that a settlement should be directed for the purpose of giving effect to the will and the settlement proposed by application would appear to be a proper one in its main lines.

C. A.
1928
GREENE, *In re.*
WHITWORTH, *In re.*
E. A., *In re.*
FRASER, *In re.*
WOOD, *In re.*

In this as in other cases the precise terms of the settlement will be dealt with by the Master.

LAWRENCE L.J.

In re ROWLAND HENRY BLYTH GREENE.
In re WINIFRED HARRIET BLYTH GREENE.

In this case the Crown does not object to the Court, if it thinks fit, directing a settlement under s. 171 of the Law of Property Act, 1925, conferring on the applicant a general testamentary power of appointment over (*a*) the whole of the marriage settlement funds, and (*b*) a sum of 21,140*l.* to be raised out of the Jones' estate, but the Crown does not assent to such testamentary power operating immediately on the death of the applicant so as to prevent the settled property from being available in case of need for the maintenance or otherwise for the benefit of the patients during the remainder of their lives.

As regards the marriage settlement funds, I have come to the conclusion that in the special circumstances, and particularly in view of the attitude taken up by the Crown, the Court can properly exercise its jurisdiction under the section so as to give effect to the wishes of the applicant. The case is near the line, but it comes within the letter of cl. (*b*) of sub-s. 1, and there is something to be said for the contention that when the marriage settlement was executed the parents could not have foreseen that their only surviving children would be mentally afflicted and incapable of assuming any effectual control or of having any disposing power over their shares in the settled fund, and that it is not unreasonable to suppose that had the events which subsequently happened been anticipated the settlors would have framed the settlement in such a way as not to give the patients a vested interest in the capital of the trust funds and so as to make the ultimate trust in favour of the settlors take effect as regards any part of the trust funds that might not be required for the maintenance or benefit of the patients.

Moreover, the applicant has under the after-acquired property clause been compelled to bring into settlement from

time to time all the property which she acquired during the coverture, although in view of the large fortune to which the patients became entitled under their grandfather's will this property is not reasonably required for their maintenance and will not in fact enure for their benefit. On the whole, though not without some hesitation, I am of opinion that the Court may properly hold that the applicant might suffer an injustice (in the extended sense in which that expression has been construed by this Court in *In re Freeman* (1)) if the settlement funds were allowed to devolve as on an intestacy.

Having arrived at this conclusion, I agree with the other members of this Court that, as the patients are amply provided for otherwise, there is no need to make any provision in the proposed settlement for the maintenance of the patients out of the settlement funds, and that the power of appointment proposed to be conferred on the applicant can properly be made to operate both on the capital and on the income of the settled funds immediately on the death of the applicant.

I further agree that in the circumstances there is no need to make any reservation in the settlement as regards any present or future disposition by the patients or as to the possible right of the patients' paternal aunt, Catherine Greene. On the other hand, I think that it should be made a condition of the order for a settlement that the applicant should undertake (*a*) to release her power of revocation reserved by the deed poll of July 30, 1927; (*b*) to transfer into the names of the patients the investments now standing in the names of the parents of the patients either solely or jointly with the patients or one of them; (*c*) properly to maintain the patients as heretofore; and (*d*) not to make any further application for a settlement of any property of the patients.

As regards the proposed settlement of the sum of 21,140*l.* to be raised out of the estate of John Jones, however, the case is different. Under the will of John Jones Mrs. Greene has a life interest and, subject thereto, the estate will eventually

(1) [1927] 1 Ch. 479.

C. A.
1928
GREENE, *In re.*
WHITWORTH, *In re.*
[E. A., *In re.*
FRASER, *In re.*
WOOD, *In re.*
Lawrence L.J.

go to one or other or both of the patients. The reasons urged on behalf of the applicant in support of this part of the case are unconvincing, and do not, in my opinion, form a proper basis for directing a settlement to be made of any part of that estate. In the unlikely event of the applicant surviving either or both of the patients she will be the sole next of kin, and no settlement is needed. On the other hand, if she dies in their lifetime there is no valid reason that I can see why part of the patients' property should be settled upon her, merely in order to enable her to confer a benefit upon persons and charities of her selection. When the patients become entitled in possession to the Grove Estate the judge in lunacy will consider what allowances and payments to servants, charities and other persons or bodies ought properly to be made by the patients as owners of that estate, and will no doubt see that pending a sale the estate is adequately kept up on the same lines as theretofore, but that is a very different thing from the Court in the lifetime of the patients directing a settlement of a capital sum in favour of the appointees of the tenant for life. It is not the case of the patients' being entitled in possession and the applicant herself being in need of money during her lifetime. The main grounds put forward on behalf of the applicant are, first, that she has adequately (or perhaps more than adequately) kept up the Grove Estate, and, secondly, that besides maintaining the patients out of her income she has provided a capital sum for their maintenance.

As to the first ground, I am of opinion that the fact that the applicant as tenant for life in occupation has kept the Grove Estate in first rate condition (no doubt mainly for her own satisfaction) affords no valid ground for the proposed settlement.

As to the second ground, the fund in question was made over for the benefit of the patients unconditionally with full knowledge of their permanent incapacity and of their reversionary interest under the will of John Jones. In these circumstances, I am of opinion that no case is made out for resettling that fund or its equivalent upon the applicant.

I agree, however, that the refusal of the Court to direct a settlement of the 21,140*l.* should not be taken as prejudicing any application which the applicant may deem it advisable to make under s. 117 of the Lunacy Act, 1890, for repayment of any sums expended or to be expended by her for the maintenance or benefit of the patients.

I concur in the form of order contained in the minutes referred to by the Master of the Rolls, which have been settled by the Court.

In re SARAH HANNAH WHITWORTH.

I agree that this application has no merits whatever. It seems to me to be an attempt to secure by means of a settlement under s. 171 that the property of the patient should devolve according to the law as it existed before the Administration of Estates Act, 1925, was passed. The only special reasons alleged are that the applicant's late husband some twenty years ago took an interest in the patient's affairs in his capacity of trustee of the applicant's father's will, and was appointed, and for some time acted as trustee of the will of Mary Rushworth, under which the patient took an interest, and, further, that the applicant herself corresponded with the patient at Christmas and on her birthday. These reasons have no substance in them, and, in my opinion, no settlement ought to be directed by the Court in this case.

In re E. A.

In my opinion this is a case which clearly comes within both the letter and the spirit of sub-s. (*c*) of s. 171.

Since the patient executed his will in 1887 his children have all married, and have had issue, and his eldest son has died, leaving a widow and four children. In view of these changes in the circumstances I am satisfied that the family of the deceased son, and the family of any other of the patient's children happening to die in the lifetime of the patient, would suffer an "injustice" within the meaning of that expression as interpreted by this Court in *In re*

C. A. 1928

GREENE, *In re.* WHITWORTH, *In re.* E. A., *In re.* FRASER, *In re.* WOOD, *In re.*

Lawrence L.J.

Freeman (1) if the patient's property were allowed to devolve under the testamentary disposition executed by him.

I agree therefore that the Court ought to direct a settlement in the terms proposed.

In re CHARLES RICHARD MATHEWS FRASER.

I agree that this is a case where the Court can properly accede to the application.

The whole of the patient's property has been acquired by him from his maternal relations mainly under the will of his maternal grandfather, under the marriage settlement of his parents, under his mother's will and as heir at law of his mother and sister; therefore the case comes within sub-s. 1 (*b*) of s. 171. The circumstances of this case are very special. The patient's father deserted the patient's mother in 1875. He went to South Africa, and in 1877 the patient's mother obtained a divorce. Since his desertion in 1875 the patient's father has contributed nothing towards the maintenance of the patient's mother or of the patient himself or of his sister.

It is not known whether the father is alive or dead or whether there are any paternal relations of the patient in existence, but neither he nor they have shown the slightest interest in the patient for upwards of fifty years.

Since the death of his mother the patient has been cared for and his affairs looked after by his maternal cousins, the applicant and her sister Mrs. Robinson, and since the latter's death by the applicant.

It is now desired that the Court should direct a settlement so as to exclude any possible claims on the part of the patient's paternal relations.

In my opinion this is a clear case where the Court in the circumstances ought to assist the applicant in her endeavour to keep the patient's property in the mother's family, a course which the patient would no doubt have adopted had he been able.

(1) [1927] 1 Ch. 479.

In re ROBERT JAMES WOOD.

C. A.
1928
GREENE, *In re.*
WHITWORTH, *In re.*
E. A., *In re.*
FRASER, *In re.*
WOOD, *In re.*
Lawrence L.J.

In this case I am of opinion that the loss of the patient's will is a special circumstance justifying the Court in directing a settlement under s. 171, sub-s. 1 (*c*), in order to prevent a possible injustice to the applicant. I, therefore, agree with the proposed order.

Solicitors for the various parties: *Peacock & Goddard; Sewell, Edwards & Nevill, for Hill & Norris, Halifax; Stow, Preston & Lyttelton; Beamish, Hanson, Airy & Co.; Official Solicitor; Treasury Solicitor.*

W. I. C.
H. C. G.

PADDINGTON BOROUGH COUNCIL *v.* FINUCANE.

RUSSELL J.
1928
March 23.

[1926. P. 1708]

Local Authority—Notice to repair Premises—Service on Rack-rent Owner—Notice not complied with—Repairs carried out by Local Authority—Charge on all interested in the Premises—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 257—*Housing, Town Planning, &c., Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 35), *s.* 28—*Housing Act,* 1925 (15 *Geo.* 5, *c.* 14), *s.* 3.

The charge created by s. 3 of the Housing Act, 1925, for expenses incurred by a local authority for work done to premises to make them reasonably fit for human habitation, and for the payment whereof the owner of the premises is liable, is not a charge on the interests of the rack-rent owner only, but is a charge upon the entirety of the interests in the premises.

In this summons the plaintiffs claimed as the local authority, within the Housing, Town Planning, &c., Act, 1919, against the defendant, Finucane, as the owner of the premises, No. 29, Clarendon Street, Paddington, for: (1.) A declaration that they were entitled, under s. 28, sub-s. 3, of the Act, as amended by s. 3, sub-s. 3, of the Housing Act, 1925, to a charge upon the premises for the sum of 251*l.*, being the amount of the expenses incurred by them in executing certain works thereto, together with interest at 5 per cent. from November 10, 1921, and that such

RUSSELL J. 1928 PADDINGTON BOROUGH COUNCIL v. FINUCANE.

charge was entitled to priority over any other mortgage or charge on the premises (if any); (2.) an inquiry (if necessary) whether there were any, and, if so, what incumbrances on the premises besides such charge, and who were entitled in respect of such incumbrances (if any); (3.) that for the purpose of enforcing the charge the premises might be sold and the proceeds of sale applied in payment of the charge, including the costs of this action.

In April, 1920, the tenant of the premises in question was the defendant, Finucane, who had mortgaged them to one Fairbridge, on whose behalf the rents were collected by an agent named Weston. On April 30, 1920, the plaintiffs served a notice on Weston under s. 28, sub-s. 1, of the Housing, Town Planning, &c., Act, 1919, requiring certain work to be done to the premises within twenty-eight days to make them reasonably fit for human habitation. That notice was not complied with, and no application or appeal in connection therewith was ever made either to the Local Government Board or to the Minister of Health. The notice not having been complied with, the plaintiffs, at the expiration of the time specified, duly executed and carried out the works at a cost of 25*l*. On December 20, 1920, a letter was received by the medical officer of health from Weston, stating that he had resigned the collection of the rents of the premises, and that the mortgagee had handed the property back to the defendant Finucane. Demand was made on Finucane for the payment of the 25*l*., and, the demand not having been complied with, the plaintiffs took proceedings against him in a Court of Summary Jurisdiction. The case was heard on December 8, 1921, when the defendant was ordered to pay to the plaintiffs the sum of 25*l*. and the costs of the proceedings. The plaintiffs never received such sum or any part thereof, and it has remained wholly unpaid and unsatisfied. Subsequently the plaintiffs discovered the other parties interested in the property, and, having obtained leave to amend the summons, joined them as respondents. The freehold was found to be vested in the Ecclesiastical Commissioners. Next to them the

Paddington Estate Trustees, a statutory body, held for a term of 2000 years from May 21, 1895. Under them the Grand Junction Canal Company held for 2000 years, less one day, from the same date. One Lieutenant-Colonel Winstanley derived under the Grand Junction Canal Company, and, as respects his interest, there was a mortgage. Then came the defendant Finucane and his mortgagee. Lieutenant-Colonel Winstanley and his mortgagees, and Finucane and his mortgagee did not appear before the Court, the effective respondents being the Ecclesiastical Commissioners and the Paddington Estate Trustees.

Hon. R. Stafford Cripps K.C. for the plaintiffs. The principal question to be determined is whether the charge created by s. 28 of the Housing, Town Planning, &c., Act, 1919, as amended by s. 3 of the Housing Act, 1925, is a charge on the interests of the rack-rent owner only—in this case Finucane—or is a charge on all the interests in the premises? There has been no decision on this section, but the charge created by s. 257 of the Public Health Act, 1875, is very similar to the charge we are now dealing with, and that charge has been held to be a charge on the interest of every owner of the premises according to the value of his interest: *Birmingham Corporation* v. *Baker* (1); *Tendring Union Guardians* v. *Dowton*. (2) I submit, therefore, that the charge created by s. 3 is a charge on all the interests in the premises, and that the plaintiffs are entitled to an order for the sale of the premises: *West Ham Corporation* v. *Sharp*. (3)

There are two other points on which it is desirable that the Court should express an opinion. The first is whether it is necessary for the local authority in these cases, before they take proceedings, to ascertain who are all the parties interested in the premises, and bring them before the Court, or is it sufficient if, in the first instance, they take proceedings against the rack-rent owner only? Sect. 29, sub-s. 1, of the

(1) (1881) 17 Ch. D. 782. (2) (1890) 45 Ch. D. 583; [1891] 3 Ch. 265.
(3) [1907] 1 K. B. 445.

RUSSELL J.
1928
PADDINGTON BOROUGH COUNCIL v. FINUCANE.

Housing Act, 1925, plainly indicates that the onus is not on the local authority, but rather that the onus lies on an owner, other than a rack-rent owner, to give notice of his desire to be made a party to the proceedings. On the other hand, if the local authority is not satisfied with taking proceedings against the rack-rent owner only, it can, under s. 3, sub-s. 8, discover who is the superior owner, and proceedings can be taken against such superior owner.

The next question is whether an owner, other than a rack-rent owner, on whom a notice has been served under s. 3, sub-s. 1, can raise any question that can be raised by a statutory owner under sub-s. 6 of that section? If the Statutory owner does not exercise his right of appeal there is no provision in the Act which enables any other owner to dispute anything in the notice. It becomes binding on all the owners.

Walters for the defendants. The charge created by s. 3 only overrides the interest of the rack-rent owner. Sub-s. 3 can only apply to the leasehold interests, and under sub-s. 4 expenses can only be recovered from the owner or occupier. Again under sub-s. 6 it is only the rack-rent owner who can raise objections against the notice, and under sub-s. 7 any notice, demand or order is binding and conclusive on the rack-rent owner only. Sect. 32 specifically states that a charge created by a charging order under that part of the Act has priority over other estates and interests. There is no such provision in regard to a charge under s. 3.

With regard to the question of whether the onus lies on the local authority to ascertain who are interested in the premises before taking proceedings, it is to be noted that in the Act of 1919, under which these proceedings were commenced, there are no provisions similar to those in s. 29, sub-s. 1. Therefore that sub-section cannot apply here.

RUSSELL J. The point for decision in this case arises under the Housing Act of 1925. The proceedings in this particular case were initiated under the Act of 1919, but there is no substantial difference between the two Acts.

The matter arises in this way. There was a house in Paddington, No. 29 Clarendon Street, which apparently got into a very disreputable condition of repair. The local authority, the Paddington Borough Council, served a notice under the Housing Act of 1919 upon the owner within the meaning of s. 28. The corresponding section in the 1925 Act is s. 3, sub-s. 1, which provides that: "If the owner of any dwelling-house suitable for occupation by persons of the working classes fails to make or keep the house in all respects reasonably fit for human habitation, then, without prejudice to any other powers, the local authority may serve a notice upon the owner of the house requiring him within a reasonable time, not being less than twenty-one days, specified in the notice, to execute the works specified in the notice as being necessary to make the house in all respects reasonably fit for human habitation." Under sub-s. 10 "owner" has the same meaning as in the Public Health Acts, and the phrase "Public Health Acts" is defined in s. 136 as meaning as regards London, the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76). The definition of "owner" in s. 141 of that statute is as follows: "The expression 'owner' means the person for the time being receiving the rack-rent of the premises in connexion with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such premises were let at a rack-rent."

The position as regards No. 29 Clarendon Street is this. At the date when the notice was served the tenant was Mr. Finucane. He had mortgaged the premises to a gentleman named Fairbridge, who was collecting the rents by means of an agent named Weston. Accordingly, the notice was served under the 1919 Act upon Mr. Weston as coming within the definition of "owner." The notice required that certain work should be done, and that notice was not complied with. The works were ultimately executed by the local authority, and on December 8, 1921, they obtained an order from the magistrates, again under the provisions of the 1919 Act, ordering that Finucane "do pay to the borough council of

RUSSELL J. 1928 PADDINGTON BOROUGH COUNCIL v. FINUCANE.

Paddington . . . . the amount of such expenses." Sect. 3, sub-s. 2, of the 1925 Act provides that: "If the notice of the local authority is not complied with, then (*a*) at the expiration of the time specified in that notice if no such counter notice as aforesaid has been given by the owner; and (*b*) at the expiration of twenty-one days from the determination by the Minister if such counter notice has been given by the owner, and the Minister has determined that the house is capable without reconstruction of being made in all respects reasonably fit for human habitation; the local authority may themselves do the work required to be done," and sub-s. 3 provides that: "Any expenses incurred by the local authority under this section, together with interest, ... may be recovered in a court of summary jurisdiction and until recovery of such expenses and interest the same shall be a charge on the premises. In all summary proceedings by the local authority for the recovery of any such expenses, the time within which the proceedings may be taken shall be reckoned from the date of the service of notice of demand." On August 18, 1926, the local authority, having failed in the meanwhile to obtain payment from Finucane, issued the present summons and made Finucane the sole defendant.

The first point I have to determine is, what is the effect of s. 3 of the Act of 1925 as regards the charge which it thereby purports to give? Is it a charge upon all the proprietary interests in the house in question, or is it, as has been contended on behalf of the Ecclesiastical Commissioners and the Paddington Estate Trustees, only a charge upon the interest of the rack-rent owner? There has been no decision upon this actual section, but there have been decisions upon very similar provisions in the Public Health Act, 1875, and I have no doubt that the charge which the section purports to give is a charge of such a nature as that it overrides all other proprietary interests which exist in the house. Certain authorities have been cited, but I only propose to refer to one of them, because in that case the Court of Appeal lays down quite specifically the position under an Act very similar to this. It was a question of the effect of the charge

under s. 257 of the Public Health Act, 1875, which provides; "Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered, together with interest at a rate not exceeding 5*l.* per centum per annum, from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses were incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred." "Owner," according to s. 4 of that Act, "means the person for the time being receiving the rack-rent of the lands or premises in connexion with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent." "Premises" includes "messuages, buildings, lands, easements and hereditaments of any tenure." In *Tendring Union Guardians* v. *Dowton* (1) the question arose whether a sale for the purpose of enforcing such a charge would free the land sold from the burden of a restrictive covenant to which the land was subject. Stirling J. came to the conclusion that a sale would free the land from such restrictive covenant, but the Court of Appeal took a different view. Lord Halsbury says (2): "I am not able to agree with the decision arrived at by Stirling J. It is clear that the plaintiffs have no right to any charge on the premises, except so far as it is given by the provisions of the statute; and both the language of the 257th section and the frame of the statute appear to me irreconcilable with the contention of the plaintiffs." Then he refers to the words of the section, "The same shall be a charge upon the premises," and he asks what is the meaning of those words. He refers to s. 150 of the Act and comes to this conclusion: "Therefore, it is clear that the person against whom the judgment is to stand is the

(1) [1891] 3 Ch. 265. (2) [1891] 3 Ch. 267.

RUSSELL J. 1928 PADDINGTON BOROUGH COUNCIL v. FINUCANE.

owner. Indeed, the whole machinery of the Act shows that the owners and occupiers are the persons against whom the proceedings are to be taken." He next deals with the case of the *Birmingham Corporation* v. *Baker*. (1) That case he says "has been relied on by Stirling J., but with great respect for the learned judge, I think that the very language which the Master of the Rolls used in that case shews that he would have repudiated the contention of the plaintiffs in the present case. He says: 'The works in question are an improvement to the property, not to the interest of any particular owner of the property, but of every owner of the houses; and consequently there is no good reason in the world why there should not be a charge on the property, that is, on the respective interest of every owner of the property according to the value of his ownership.' And then he goes on to say, 'If there be a charge on the houses it is a charge on the total ownership—if I may call it so, on the proprietorship; not on any particular section or portion of the proprietorship, but on the whole. In an ordinary case, in the absence of any covenants, it should be borne by every proprietor in proportion to his interest in the house.' And that is intelligible, for they all have the benefit of the money expended. But here we are asked to include in the proprietorship persons who have no interest in the property in a legal sense, but who have an interest in other premises." Lord Halsbury was clearly of opinion that in the ordinary case a sale for the purpose of giving effect to a charge under s. 257 of the Public Health Act would clear the land of all other proprietary interests. Lindley L.J. takes the same view, and quotes in the same way the language of Sir George Jessel in the case of *Birmingham Corporation* v. *Baker*. (1) Fry L.J. puts it quite plainly. He says (2): "I am of the same opinion. I think there is nothing to justify a declaration that the charge overrides the restrictive covenant. All the Act does is to create a charge on the premises—that is, on the land—that is, on all the interests of the owners of the land." Upon that authority, citing,

(1) 17 Ch. D. 782. (2) [1891] 3 Ch. 269.

as it does, with approval the language used by the Master of the Rolls in the case of the *Birmingham Corporation* v. *Baker* (1), I have no difficulty in saying that s. 3 of this Act, which for this purpose is in similar terms, when it confers a charge on the premises, means not a charge only on the interests of the rack-rent owner in the premises, but a charge upon the entirety of the interests of the premises, the whole of the proprietary interests of the premises. That view, I think, is borne out when one looks at sub-s. 8 where it is quite clear that the Legislature when it wishes to use the expression "an estate or interest in the premises" uses it, and makes it quite plain.

Accordingly, as regards the first point raised before me, I declare that the plaintiffs are entitled under s. 3 of the Housing Act, 1925, to a charge upon the premises No. 29 Clarendon Street, Paddington, for the sum of 251*l.* and legal expenses, together with interest at 5 per cent., from November 10, 1921, and that such charge is entitled to priority over any other interest in the premises. I will follow that up by making an order for the sale of the premises.

The rest of the summons, which asks for an inquiry as to other incumbrances, which ought, of course, to be an inquiry as to other estates and interests in the property, really is only relevant in the event of the house fetching more than the amount of the charge thereon. As I am told it is highly unlikely that that will be so, that part of the summons had better stand over until the sale has been effected, and we know what the sum is that we have to deal with.

There are two other matters which are not directly raised before me, but which I was asked to make reference to. The first question is this: Who shall be named parties to applications similar to these, where the local authority desires to enforce a charge; should the local authority go out of its way to ascertain fully the state of the title of the property, or would it be enough if it brought before the Court, in the first instance, the rack-rent owner, the owner living in the property. I think it would be sufficient for it to bring before

(1) 17 Ch. D. 782.

RUSSELL J. 1928 PADDINGTON BOROUGH COUNCIL v. FINUCANE.

the Court, in the first instance, the owner within the definition of the Public Health Act; but at the same time when the matter comes before the Court and it is asked to enforce the charge, the Court will be fully at liberty to direct further steps, if necessary, to be taken to ascertain who are the persons really entitled and, if necessary, the Court will give directions for them to be served to be heard upon the application; because it may very well be that a case would arise in which the amount of the costs and the expenses incurred would bear only a small relation to the real value of the property, and a person with a remoter interest in the property might be desirous of saving the property by paying off the charge. I do not propose to lay down hard and fast rules. I only say that in the first instance it would be sufficient to bring the rack-renter before the Court.

A second point was raised as to whether, if such person were brought before the Court under the Act, it would be open to that person to take objections which the rack-rent owner might have taken when served with the original notice, but did not take. In my opinion, after giving the section the best consideration I can, once the rack-rent owner has been served, and the matter has gone through without any appeal by him, the notice has become binding and conclusive for all purposes against everybody.

Solicitors for the plaintiffs: *J. H. Hortin & Nash.*
Solicitors for the defendants: *Trower, Still & Keeling.*

P. J. B.

RUSSELL J.

1927

May 26.

In re BANCROFT.

BANCROFT *v.* BANCROFT.

[1926. B. 5046.]

Will—Gift of "all my rights in connection with the play 'D'"—No "contrary intention"—Contract for sale of film Rights. Completion after Death of Testator—Right of Legatee to the purchase Price—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 24.

By his will the testator gave to M. "all my rights to or in connection with the play 'Diplomacy.'" The testator afterwards entered into a contract for the sale to a company of the film rights in the play, but died before the assignment was executed. His executors afterwards assigned the film rights to the company:—

Held, that, as no contrary intention appeared, the will must be construed as if it had been executed immediately before the death of the testator, at a time when one of the rights in connection with the play was the right to sue for specific performance of the contract and to receive the 1500*l.*, and that the right under the terms of the gift in the will passed to M.

Adjourned Summons.

The will of the testator, Sir Squire Bancroft, dated February 18, 1925, contained the following bequest: "I give to Sir Gerald du Maurier all my rights to or in connection with the play 'Diplomacy.'" The testator was the absolute owner of the copyright in English of the play "Diplomacy." His agent entered into negotiations for the sale of the film rights of the play to the Famous Players Film Company, Ld., and, on April 6, 1926, received from them a verbal offer of 1500*l.* for the said rights. He communicated the offer to the testator, who, on April 7, wrote to him accepting. Thereupon the agent wrote to the Famous Players Film Company, Ld., that Sir Squire Bancroft would accept the offer of 1500*l.* for his interest in the film rights of "Diplomacy." The testator died on April 19, 1926, and on October 6, 1926, his executors assigned the said film rights to the said company in consideration of the payment to them of 1500*l.*

The summons asked whether on the true construction of the will and in the events which had happened Sir Gerald

RUSSELL J. 1927 BANCROFT. *In re.* BANCROFT *v.* BANCROFT.

du Maurier was entitled to the 1500*l.*, the sum paid by the company for the assignment to them of the film rights of "Diplomacy," or whether it formed part of the residuary personal estate of the testator.

Cecil Turner for the plaintiff, one of the executors.

Danckwerts for the residuary legatees. The sale of the film rights was to that extent an ademption of the gift to Sir Gerald du Maurier, and he is therefore not entitled to the purchase money: *Watts* v. *Watts*. (1)

Stafford Crossman for Sir Gerald du Maurier. Under s. 24 of the Wills Act, 1837, this bequest must be construed as at the date of the testator's death, unless a contrary intention appears by the will. There is nothing in this will to show a contrary intention. "All my rights to or in connection with the play 'Diplomacy'" is generic. At the death of the testator they might be more or less than they were at the date of the will. In such a case the use of the word "my" is not sufficient to show a "contrary intention": *In re Clifford*. (2) One right "in connection with the play 'Diplomacy'" at the date of the testator's death was the right to sue for specific performance of the contract and to receive the 1500*l.* and that right, on the true construction of the will, passed to my client.

RUSSELL J. Before the death of the testator a binding contract for the sale of the film rights of "Diplomacy" had been entered into. The testator could insist on the purchaser taking an assignment of the rights and paying the purchase money, and the purchaser could insist on the assignment to him of those rights. In these circumstances, as the contract was not carried out in the lifetime of the testator, did the purchase price of the film rights pass to Sir Gerald du Maurier under the gift to him in the will of "all my rights to or in connection with the play 'Diplomacy'"? Under s. 24 of the Wills Act, 1837, these words must be construed as if the will had been executed immediately before the death of the testator, unless a contrary intention appears by the will. No contrary intention appears by this will. When a bequest is of that which

(1) (1873) L. R. 17 Eq. 217. (2) [1912] 1 Ch. 29, 33.

is generic—of that which may be increased or diminished, the Act requires something more on the face of the will for the purpose of indicating such " contrary intention " than the mere circumstance that the subject of the bequest is designated by the pronoun " my " : *In re Clifford.* (1) In this case there is no other indication. Immediately before his death the testator was still in law the owner of the film rights, although in equity he had parted with them, but he was only bound to complete in exchange for 1500*l.* One of his rights in connection with the play " Diplomacy " was the right to enforce specific performance of the contract of sale and to receive the purchase money, and that right under the gift in the will passed to Sir Gerald du Maurier, who is therefore entitled to the 1500*l.*

Solicitors : *Capron & Co.*

J. B. B. M.

Applied. EDWARDS *v.* HALL. [1949] 1 All E.R. 352.

In re PRICE.

[1927. P. 2318.]

Law of Property—Administration—Copyholds—Entail—Gavelkind Custom of Descent — Undivided Shares — Statutory Trusts — Entailed Interest in Personalty—Absolute Interest—Law of Property Act, 1922 (12 *& 13 Geo.* 5, *c.* 16), *s.* 128; *Sch.* 12, *para.* 1 (*a*) (*d*); *para.* 2; *para.* 8, *proviso* (*iv.*) *—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *ss.* 35, 130, 176, *sub-s.* 4, 202 *and* 207, *proviso* (*a*); *Sch.* 1, *Part I., Part IV., para.* 1, *sub-para.* 4— *Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 3, *sub-s.* 1 (*ii.*), *s.* 45, *s.* 51, *sub-s.* 4.

T. J. P. died on January 28, 1926, without issue and without having confirmed or republished his will which he had made on July 20, 1925. He was, before January 1, 1926 (when the Law of Property Act, 1925, came into operation), tenant of one undivided ninth share in customary tail special by descent in land formerly of copyhold tenure subject to the custom of gavelkind, but at that date by virtue of s. 128 and Sch. 12, para. 1, sub-s. (*a*), of the Law of Property Act, 1922, and s. 202 of the Law of Property Act, 1925, of freehold tenure, the entirety of the land which then became vested by virtue of Part IV. of the First Schedule, para. 1, sub-para. 4, of that Act, in the Public Trustee, having subsequently become vested in trustees appointed in his place upon the statutory trusts mentioned in s. 35 of the 1925 Act :—

(1) [1912] 1 Ch. 29, 33.

CLAUSON J.

1928

PRICE, *In re.*

Held, first, that on January 1, 1926, T. J. P., in exchange for his customary estate tail in his share of the land, acquired, by force of the statutory conversion effected by s. 35 of the Law of Property Act, 1925, an equitable interest in a corresponding share of the proceeds of sale of the land: and secondly, that s. 130 of that Act had no effect in causing that interest to become an entailed interest in personalty within the meaning of that Act; but the rights of T. J. P. (the tenant in tail and, as such, the person interested in the land) in his share in the proceeds of sale thereof, to be given effect to by s. 35, consisted in an absolute interest in personalty which passed, accordingly, under his will to the executors thereof.

Semble, in the absence of such a statutory conversion of the land into personal estate, the share of T. J. P. in the land on his death descended under the Inheritance Act to the heir at common law of the body of the last purchaser and not to the heir in gavelkind of the last purchaser; the effect of the enfranchisement having been to destroy the gavelkind custom: see Law of Property Act, 1922, Sch. 12, para. 1, sub-para. (*d*). Further, even if the interest of T. J. P. in the proceeds of sale of the land were an entailed interest in personalty, it would devolve, nevertheless, on his death upon the persons who, by virtue of s. 130, sub-s. 4, would have been entitled thereto, had the entailed interest before the commencement of the 1925 Act, been limited in respect of freehold land governed by the general law then in force.

ORIGINATING SUMMONS.

The facts, which are taken from the judgment of Clauson J., are as follows:—

In the year 1832, William Price and Elizabeth his wife were minded to acquire fourteen acres of copyhold land, parcel of the manor of Abercarn in the county of Monmouth, in which manor there existed, until the coming into force of the Law of Property Act, 1922, on January 1, 1926, the custom of gavelkind and of entail. It appeared that there was in the manor no custom to devise entailed lands or to disentail by will, and that the customary mode of disentail was by surrender followed by admittance discharged from all estates tail. William and Elizabeth procured that, as to four undivided fifth parts on December 31, 1832, as to one undivided tenth part on June 29, 1835, and as to the remaining one undivided tenth part on September 26, 1837, the fourteen acres should be surrendered to the use of William and his wife Elizabeth for their lives and the life of the survivor and after the decease of the survivor to the use of the heirs of the body of Elizabeth by William her husband and, for want of such

issue, to the use of the customary heirs of William; and William and Elizabeth were on the above mentioned dates duly admitted to the uses aforesaid. William Price died on August 7, 1866, without having disentailed the fourteen acres, and having by his will dated May 4, 1860, devised the fourteen acres to his three sons, David, Thomas and Richard their heirs and assigns share and share alike as tenants in common. The three sons were in fact his only sons and his customary heirs. It was suggested in an affidavit filed in the proceedings that the devise was ineffectual to pass any interest in the lands: but Clauson J. held that it was immaterial whether that view was correct or whether the will was effectual to devise the customary fee in the fourteen acres subject to the preceding estate tail. Elizabeth Price died on February 23, 1873, without having disentailed. On December 14, 1875, the three sons David, Thomas and Richard were admitted to hold the fourteen acres to themselves and their customary heirs as tenants in common.

David, the eldest son, had one child only, Rachel Jane Price, afterwards Rachel Jane Holmes. David Price died on July 8, 1898, without having executed any disentailing assurance. It was not stated in the evidence that he died intestate; but Rachel Jane Holmes appeared to have been admitted on March 27, 1899, and then to have disentailed her father's one-third by surrender and admittance, the mode of disentailing customary in the manor. It was assumed at the hearing that Rachel Jane Holmes was immediately before January 1, 1926, tenant in customary fee simple of one-third of the fourteen acres. Immediately before January 1, 1926, and at the time of the proceedings, the heir of the body of Elizabeth by William in respect of any land to the descent of which the rules of the common law would apply was Rachel Jane Holmes.

Richard, the third son, had three daughters. The evidence before the Court assumed that Richard's three daughters were entitled in equal shares to his one-third. They had been admitted to their father's one-third as tenants in customary fee, but it was immaterial to consider whether,

CLAUSON J. 1928 PRICE, *In re.*

immediately before January 1, 1926, they held in customary fee or in tail, and they were not parties to the proceedings.

Thomas, the second son, had five sons, two of whom predeceased their father. Thomas died on October 22, 1909, having by his will dated August 14, 1909, devised his one-third in the fourteen acres to his three surviving sons Thomas John Price, Alfred George Price, and Ernest James Price in equal shares. Shortly after Thomas' death, namely, on December 16, 1910, Ernest James died leaving three sons, Douglas, Ernest and Alfred. It did not appear that he left a will. On April 23, 1912, by an admittance which stated that Thomas John Price and Alfred George Price were devisees of Thomas Price and that Ernest's three sons were the customary heirs of Ernest James Price another devisee of Thomas Price, Thomas John Price was admitted to one-ninth (being one-third of Thomas Price's one-third) of the fourteen acres to hold to him and his customary heirs; Alfred George Price was admitted to another one-ninth to hold to him and his customary heirs, and Ernest's three sons were admitted to one other one-ninth (subject to the widowhood estate, if any, of their mother) to hold to themselves and their customary heirs in coparcenary.

Apart from the circumstance that Rachel Jane Holmes was admitted and then after a surrender was admitted to hold to her and her customary heirs discharged from all estates tail, the fourteen acres seem to have been treated throughout on the court rolls on the footing that on Elizabeth's death her three sons David, Thomas and Richard, who were in fact when she died on February 23, 1873, the customary heirs of her body by William Price, took estates in customary fee simple.

It was, however, assumed by all parties before the Court that the effect of the admittances of William and Elizabeth in 1832, 1835 and 1837, followed by William's death, was to vest in Elizabeth an estate in customary tail special to herself and the heirs of her body by William Price.

On January 1, 1926, the Law of Property Act, 1922 (so far as it was unrepealed), the Law of Property Act, 1925, the

Settled Land Act, 1925, and the Administration of Estates Act, 1925, came into force. Before that date, namely, on July 20, 1925, Thomas John Price made his will. He did not, after the commencement of the Law of Property Act, 1925, execute a will or confirm or republish an existing will or codicil (see, as to the relevancy of that fact, s. 176, sub-s. 4, of Law of Property Act, 1925). Thomas John Price died on January 28, 1926, without issue and without having executed any disentailing assurance of his interest in the fourteen acres or in the proceeds of sale thereof arising or to arise under the Acts above mentioned.

By virtue of proviso (iv.) of para. 8 of Sch. 12 of the Law of Property Act, 1922, and of Part IV. of Sch. 1, para. 1, sub-para. 4, of the Law of Property Act, 1925, the entirety of the fourteen acres vested in the Public Trustee, and by a deed dated November 22, 1927, trustees were appointed in his place of the fourteen acres to hold upon the statutory trusts: see s. 35 of the Law of Property Act, 1925.

This summons was taken out by the trustees to have it determined whether, in the events which had happened, the one-ninth share of Thomas John Price vested in (*a*) Mrs. Rachel Jane Holmes, or (*b*) his brother Alfred George Price, or (*c*) as to one half in Alfred George Price and the other half in the sons of Ernest James Price.

The executors of Thomas John Price's will were not parties.

Gilbert H. Hurst for the trustees (after stating the facts to the Court). Sect. 176 of the Law of Property Act, 1925, gives a tenant in tail power to dispose of property by will in like manner as if, after barring the entail, he had been tenant in fee simple; but the section applies only to wills executed or confirmed or republished after the Act. Thomas John Price, therefore, at his death had only an entailed interest in his one-ninth share; his estate in such share having been converted into an equitable interest under Sch. 1, Part I., of the Law of Property Act, 1925. The question is whether his undivided one-ninth share descended according to the custom of gavelkind or according to the common law rules

CLAUSON J.

1928

PRICE, *In re.*

of descent, as affected by the Inheritance Act, 1833. That question arises in case the entirety of the land is to be treated as real property or in case the land was converted into personalty by virtue of s. 35 of the 1925 Act and the interest of Thomas John Price in the proceeds of sale became an entailed interest and not an absolute interest. Upon the coming into force of the Law of Property Act, 1922, the land became enfranchised land: see s. 128 of that Act; and by Sch. 12, para. 1, sub-para. (*a*), it became freehold land, and by sub-para. (*d*) became no longer subject to the customary mode of descent of gavelkind. By para. 2 of that Schedule the enfranchisement is not to affect the rights or interests of any person in the enfranchised land who is interested by purchase, and those rights and interests are to continue to attach to the enfranchised land. Then s. 45 of the Administration of Estates Act, 1925, appears to abolish the gavelkind custom, but by sub-s. 2 thereof nothing in that section is to affect the descent or devolution of an entailed interest. Sect. 130 of Law of Property Act, 1925, enables entailed interests to be created in personal property, and by sub-s. 7 "entailed interest" includes an estate tail created before the commencement of the Act; and by sub-s. 4 an entailed interest (which includes an estate tail created before the Act) is to devolve as an equitable interest upon the persons who would have been successively entitled thereto as heirs of the body of the tenant in tail, if the entailed interest had before the Act been limited in respect of freehold land governed by the general law then in force. Sect. 202 of the 1925 Act provides that the enfranchisement effected by the Act of 1922 shall be deemed to have been effected immediately before the commencement of the former Act. Sect. 207 provides that certain repeals thereby effected are not to affect the validity of any title or right acquired before the commencement of the Act of 1925.

H. C. Bischoff for Rachel Jane Holmes. The land formerly copyhold became enfranchised: see s. 128 of Law of Property Act, 1922, and became freehold by force of Sch. 12, para. 1, sub-para. (*a*), of the same Act. The estate tail devolved as

an equitable interest; but the custom of descent of gavelkind has been abolished : see Sch. 12, para. 1 (*d*) ; s. 45 of the Administration of Estates Act, 1925. The share of Thomas John Price was never disentailed and devolved on his death as an equitable interest as if the entailed interest had at the commencement of the Law of Property Act, 1925, been limited in respect of freeholds governed by the general law in force immediately before the Act and such law had remained unaffected : see s. 130, sub-s. 4, Law of Property Act, 1925. Consequently, upon his death without issue, his one-ninth share was an entailed interest in freehold land and devolved according to the common law rules of descent. To find the heir it is necessary to trace back to Elizabeth Price, the last purchaser, and through her eldest son David, the father of Rachel Jane Holmes, his only child. It was the aim of the new legislation to abolish copyhold tenure and customary tenure, but to preserve estates tail under the form of entailed interests.

John W. F. Beaumont for Alfred George Price. Thomas John Price at his death on January 28, 1926, was entitled to an entailed interest in one-ninth share of the land which descended to the heir of the body of his grandmother Elizabeth Price by William Price. The descent must be traced from her through Thomas Price, the son of Elizabeth Price and father of Thomas John Price. The share passed on the death of Thomas Price to his own issue as representing their parent : *In re Matson.* (1) On the death of Thomas John Price after the commencement of the Law of Property Act, 1925, his one-ninth share descended to his heir at common law, as the custom of descent by gavelkind had then been abolished by the new Acts. The descent having to be traced down from Elizabeth through Thomas Price, Alfred George Price, as representing his father Thomas, is the heir at common law of his deceased brother Thomas John Price.

F. Baden Fuller for the three sons of Ernest James Price deceased. The enfranchisement affects the tenure of the land, but does not alter the rights and interests of the persons

(1) [1897] 2 Ch. 509.

CLAUSON J. 1928 PRICE, *In re.*

entitled under the custom of gavelkind: Sch. 12, para. 1 (*e*), preserves the title and para. 2 has the same effect. The gavelkind custom of descent is therefore preserved by the Law of Property Act, 1922, having thereby in effect been excepted from the operation of s. 1 (*a*) of s. 45 of the Administration of Estates Act, 1925, and preserved by sub-s. 2 of that section. The descent of his one-ninth share on the death of Thomas John Price must be traced from Elizabeth Price, the last purchaser. The admittances constituted a settlement. So long as an estate tail existed there was a settlement and the inheritance was partible in its descent. Therefore the descent passes down through Thomas Price, the father of Thomas John, one half passing to his son next in seniority to Thomas John Price, namely, Alfred George Price, and the other half according to the doctrine laid down in *In re Matson* (1) to the three sons of his deceased son Ernest James Price, with the result that Rachel Jane Holmes is excluded. If the land was converted into personal estate and Thomas John Price had only an interest in the proceeds of sale, then he had an entailed interest in personal estate by virtue either of s. 35 or s. 130 of the Law of Property Act, 1925, and such interest passed on his death to his gavelkind heirs.

Cur. adv. vult.

April 2. CLAUSON J. [delivered a considered judgment in which, after stating the facts as above set out, he continued as follows:] There can be no doubt that, if the assumption which was made in this case by all the parties before me is correct, namely, that the effect of the admittances of William Price and Elizabeth his wife followed by William Price's death was to vest in Elizabeth Price an estate in customary tail special to herself and the heirs of her body by William Price, then it must follow that Thomas John Price was, immediately before January 1, 1926, tenant of his one-ninth share, not in customary fee simple, but as a tenant in customary tail special by descent and not—as it is material to state—by purchase:

(1) [1897] 2 Ch. 509.

and the same would be true of the estate of any person following him in the line of entail.

It is material to observe that immediately before January 1, 1926, one-third of the fourteen acres was held by Rachel Jane Holmes in customary fee simple. It follows that, although some of the undivided shares in the fourteen acres may at that time have been settled land, the entirety of the fourteen acres was not settled land, and that while s. 128 of the Law of Property Act, 1922, and paras. 1 (*a*), 1 (*d*), and 2, and proviso (iv.) of para. 8 of Sch. 12 to that Act applied to the fourteen acres, proviso (ii.) of para. 8 did not apply thereto.

It is also to be noted that by reason of s. 202 of the Law of Property Act, 1925, the enfranchisement of copyhold land effected by the Act of 1922 is to be deemed to have been effected immediately before the commencement of the Act of 1925, though the 1922 Act (see the Law of Property Act (Postponement) Act, 1924), and the 1925 Act (see s. 209, sub-s. 2) each came into operation on January 1, 1926.

I proceed to consider what was the effect of the 1922 Act on the one-ninth share of Thomas John Price in the fourteen acres. On January 1, 1926, the fourteen acres became enfranchised land (see s. 128) and (Sch. 12, para 1 (*a*)) freehold and (para. 1 (*d*)) freed from the custom of gavelkind, but governed by Parts VIII. and IX. of the Act of 1922, now represented by certain parts of the Administration of Estates Act, 1925. The enfranchisement did not affect the rights or interests of any person in the enfranchised land under a will, settlement, mortgage or otherwise by purchase (Sch. 12, para. 2): but this does not appear to me to be material for the purposes of the present case, since neither Thomas John Price nor any one claiming to succeed him in the line of entail in regard to the one-ninth has or can have any right or interest by purchase. I note in passing that, while para. 2 in the main reproduces s. 21, sub-s. 2, of the Copyhold Act, 1894, the words "by purchase" do not appear in the older section. The fourteen acres being held in undivided shares vest under proviso (iv.) of para. 8 of Sch. 12 in trustees for sale in accordance with Part I. of

CLAUSON J.

1928

PRICE, *In re.*

the 1922 Act, now represented by Part IV. of the First Schedule of the 1925 Act.

I turn now to the 1925 Act, and find that by reason of Part IV. of the First Schedule, para. 1, sub-para. 4, the fourteen acres vested in the Public Trustee on the statutory trusts with a proviso (iii.) which has in fact been utilized in this case, under which the Public Trustee has been displaced by virtue of a deed of November 22, 1927, by David Price Holmes, Elizabeth Price and Douglas Price, who are represented before me, and are the trustees for sale and hold the enfranchised fourteen acres as freehold land upon the statutory trusts, that is to say (see s. 35 of the Law of Property Act, 1925) upon trust (so far as material for the present purpose) to sell and stand possessed of the net proceeds and of the net rents and profits until sale "upon such trusts as may be requisite for giving effect to the rights of the persons interested in the land."

I should mention that a clause is added to s. 35 by the Schedule to the Law of Property (Amendment) Act, 1926, which relates to the case where an undivided share was subject to a settlement and the settlement remains subsisting in respect of other property. These words do not seem to affect the present case. Assuming that the one-ninth in which Thomas John Price had a customary estate tail was subject to the settlement created by the admittance of William and Elizabeth, the settlement, in so far as he took an estate tail under it, subsisted only in respect of that one-ninth and does not subsist in respect of other property. I may add that s. 1, sub-s. 7 (added by the Amendment Act of 1926), and s. 117, sub-s. 1 (ix.), of the Settled Land Act, 1925, would seem to make it clear that no settlement within the meaning of the Settled Land Act, 1925, can, since December 31, 1925, subsist in an undivided share, and in s. 35 the word "settlement" (see s. 205, sub-s. 1 (xxvi.)) has the same meaning as in the Settled Land Act, 1925.

Further, it must be borne in mind that the fact that a fund is to be paid to Settled Land Act trustees, even if it is to be capital money in their hands, does not necessarily imply

that the fund will be real estate or will devolve as land. Capital money arising under the Settled Land Acts from the sale of heirlooms or leaseholds did not, under the law before 1926 (see *In re Duke of Marlborough's Settlement* (1)), necessarily devolve as land; and the position would not seem to be materially different (at all events as regards leaseholds settled before 1926) under the Settled Land Act, 1925: see s. 75, sub-s. 5.

Sect. 130 of the Law of Property Act, 1925, deals with entailed interests: I refer to its provisions in detail below: it is enough to say, for the moment, that it provides (sub-ss. 4 and 7) that entailed interests created before the Act (which can, of course, include only entailed interests in real estate) as well as entailed interests in personalty (which can be created under this section) are to devolve as if originally limited in respect of freehold land governed by the general law in force immediately before January 1, 1926.

The Administration of Estates Act, 1925, s. 3, sub-s. 1 (ii.), makes it clear that "real estate" in Part I. of that Act does not include money to arise from a trust for sale of land and by s. 45 abolishes gavelkind, but without affecting the descent or devolution of an entailed interest. Entailed interests seem to be left to the operation of s. 130 of the Law of Property Act, 1925.

The result of this survey of the new Acts seems to show that on January 1, 1926, Thomas John Price ceased to have any estate in the fourteen acres or any part of it and became entitled to an equitable interest in the proceeds of sale of the fourteen acres—namely, such interest as might be requisite for giving effect to his rights as a person interested in the land. In my opinion such an interest is an interest in personal estate. By the statutory imposition of a trust for sale the land has, so far as beneficiaries are concerned, been converted into money, and Thomas John Price has an interest in the money. This view of the effect of the Act seems to me not only to be sound in principle but to accord with such decisions as *Richards* v. *Attorney-General of Jamaica* (2) and *Frewen* v.

(1) (1886) 32 Ch. D. 1, 11. (2) (1848) 6 Moo. P. C. 381.

CLAUSON J. 1928 PRICE, *In re.*

Frewen (1), which recognize that the usual consequences of conversion follow whether the conversion is effected by agreement or compulsorily by Act of Parliament. The provisions with which I have to deal which turn a copyhold estate into a beneficial right in a fund arising under a trust for sale seem to me to be analogous to the provisions which notionally converted, in the one case cited, slaves, and in the other case cited, an advowson, each real property, into a money claim for compensation.

If Thomas John Price acquires, under the relevant Acts, in exchange for his customary estate tail in the copyhold, an interest in personalty, it seems to follow, unless there is something in the Acts to the contrary, that the interest he thus acquires is an absolute interest: I do not see how any other than an absolute interest will give effect to his rights as a person interested in the land. It is settled beyond question that a limitation of personal estate to a person in such terms as would, in the case of land, give him an estate tail, will vest an absolute interest in him. For this proposition it is sufficient to cite one ancient authority (Cowper L.C., in the year 1715, in *Seale* v. *Seale* (2)), and one modern authority (Lord Wrenbury in the year 1922, in *Portman* v. *Viscount Portman* (3)). The Court gives effect to a gift by a testator of personalty to an individual and the heirs of his body by treating it as conferring an absolute interest: I do not see how (unless there is something in the new Acts to the contrary) the Court can translate the rights of a person interested as a tenant in tail in a share of copyhold lands into a right under a trust of the proceeds of sale of that land, except by treating him as absolute owner in equity of a corresponding share in the proceeds of sale.

It must, however, be remembered that s. 130 of the Law of Property Act, 1925, enables estates tail to be created by way of trust in personal property. Such estates can be created by certain expressions which are indicated in s. 130,

(1) (1875) L. R. 10 Ch. 610. (2) (1715) 1 P. Wms. 290.
(3) [1922] 2 A. C. 473, 504.

sub-s. 1, and by certain other expressions which are indicated in sub-s. 2. No such expressions have, of course, been used either in the Acts or elsewhere in relation to the land or fund in which Thomas John Price was interested. Sub-s. 3 enables entailed interests in personal estate to be created in the peculiar and special case of directions to enjoy or hold personal estate with land, or upon trusts corresponding to trusts affecting land in which an entailed interest subsists. This sub-section cannot be strained to fit a trust which comes into being automatically on the commencement of the Act. The nearest words to the case with which I am dealing are perhaps the words "trusts corresponding to trusts affecting land," but there were of course (until the trust for sale was imposed by the Act) no trusts affecting Thomas John Price's share of the fourteen acres in question. Further sub-s. 6, which forbids the creation of an entailed interest, except by a settlement (including a will coming into operation after the commencement of the Act) or an agreement for a settlement in which the trusts to affect the property are sufficiently declared, seems directly to negative the possibility of the creation of an entailed interest in personalty by the automatic operation of the Act.

The result seems to me to be that nothing in s. 130 turned Thomas John Price's interest in the proceeds of sale of the fourteen acres into an entailed interest in personalty within that section. His interest remains, in my judgment, so far as s. 130 is concerned, an interest limited to him by way of an estate tail in proceeds of sale of land, that is to say, in personalty, and that is an absolute interest which devolves on his death as part of his personal estate.

If it be said that the view I have expressed gives too narrow an operation to the Act, and that the Act ought not, if such a construction can reasonably be avoided, be construed to destroy without compensation the rights of those in the line of entail, a destruction which is effected by treating Thomas John Price as acquiring an absolute interest in his share of the proceeds of sale, the true answer would seem to be that no alternative construction is reasonably available.

CLAUSON J. 1928 PRICE, *In re.*

If the Legislature had intended that the interest of a tenant in tail of land in the proceeds of sale arising under a trust for sale automatically imposed by the coming into force of the Act, should become an " entailed interest in personalty," that is to say, a thing which can only be created under s. 130 and by the means pointed out in that section, there would have been no difficulty in saying so. Or, the Legislature could have specifically provided that such proceeds of sale should, for purposes of devolution, be considered as land and devolve as the land from which the money arose, would have devolved : compare s. 22, sub-s. 5, of the Settled Land Act, 1882, and s. 75, sub-s. 5, of the Settled Land Act, 1925. But, where a statutory trust is imposed, the language used by s. 35 of the Law of Property Act, 1925 (and similar language is used in the case of undivided shares in settled land : see s. 36, sub-s. 6, of the Settled Land Act, 1925), points to devolution not in accordance with the devolution of the land from which the proceeds arose, but devolution in accordance with the " rights of the persons interested " and those, in the case of persons interested in proceeds of sale, are, as I have pointed out above, rights which confer on a person who had a tenancy in tail in the land an absolute interest in the proceeds of sale when the land is converted into personalty by the imposition of a trust for sale. But further it is to be noted : first, that the introduction into the saving clause in regard to interests in copyholds (para. 2 of Sch. 12 of the Act of 1922) of the words " by purchase," thus depriving tenants in tail by descent of the protection of that paragraph, seems to indicate that the Legislature is not astute to protect the mere spes successionis of future tenants in tail by descent ; and s. 51 of the Administration of Estates Act, 1925, which protects heirs taking by purchase, but not heirs taking by descent, points in the same direction ; and secondly, that under the old law before the comparatively modern Copyhold Acts, a tenant in tail of copyholds could by enfranchisement destroy the interest of expectant heirs in tail without formally barring the estate tail : see *Ex parte School Board for London* (1),

(1) (1889) 41 Ch. D. 547.

and the cases there cited. It is not astonishing to find that the enfranchisement of an undivided share in a copyhold under legislation which is aimed at simplifying titles has (if the view I have expressed above is correct) had the same simplifying effect as an enfranchisement by an act of the tenant in tail in possession was held to have by Macclesfield L.C. in 1724 in *Dunn* v. *Green* (1)—namely, the simplifying effect of conferring an absolute interest on the person who was previously tenant in tail.

For the reasons which I have endeavoured to explain Thomas John Price became, in my judgment, on January 1, 1926, absolutely entitled to a proportionate share, namely, one-ninth, of the proceeds of sale of the fourteen acres and of the income until sale, in exchange for his previous estate tail in one undivided ninth of the fourteen acres. He died, as I have said, on January 28, 1926, and his interest, being an absolute interest, thereupon passed (subject, of course, to probate) to his executors. I am not concerned on the present occasion with the dispositions of his will.

I must now turn to the summons before me. The plaintiffs are two of the three persons who have become, in succession to the Public Trustee, under Part IV., para. 1, sub-para. 4, of the First Schedule to the Law of Property Act, 1925, trustees for sale of the fourteen acres; the third trustee is the defendant Douglas Price. The defendant Rachel Jane Holmes is, as I have pointed out above, the heiress at common law of the body of Elizabeth Price by William her husband, that is, the person who, if the fourteen acres had been freehold, would (in default of a bar of the entail) now be the tenant in tail of the fourteen acres. The defendant Alfred George Price is the next younger brother of Thomas John Price. I will endeavour later to explain his separate interest in the matter. The defendants Alfred George Price, Douglas Price, Ernest Price, and Alfred Price are the persons who, if the Acts to which I have referred had not been passed, would, on Thomas John Price's death, have succeeded to his one-ninth undivided share as the next gavelkind heirs of Elizabeth

(1) (1724) 3 P. Wms. 8.

CLAUSON J. 1928 PRICE, *In re.*

in the line of special tail in respect of this one-ninth. The summons asks whether the one-ninth of the beneficial interest in the fourteen acres which was formerly vested in Thomas John Price now belongs to (*a*) Rachel Jane Holmes or (*b*) Alfred George Price or (*c*) as to one moiety Alfred George Price, and as to one moiety Douglas Price, Ernest Price and Alfred Price. The executors of Thomas John Price are not parties to the summons.

For Douglas, Ernest and Alfred Price it was argued that in the circumstances which have happened they, but for the new legislation, would have succeeded to the one-ninth on Thomas John Price's death. It was pointed out, quite correctly, that as issue of deceased heirs stand in place of their parents (*In re Matson* (1)), Thomas John Price's one-ninth would, but for the new legislation, pass to the gavelkind heirs of Elizabeth traced through Thomas the father of Thomas John, that is, to Alfred George as to one moiety and Douglas, Ernest and Alfred (the sons of Ernest) as to the other moiety. It was suggested that para. 2 of Sch. 12 to the Act of 1922, preserved the rights of the gavelkind heirs thus to take by descent; but one answer at least to that contention is, as I have already pointed out, that that clause preserves only rights taken by purchase and not rights taken, or to be taken, by descent. It was then suggested that, under the statutory trusts, Thomas John Price, between the coming into force of the new legislation and his death on January 28, 1926, had an entailed interest in personalty which passed to his gavelkind heirs; and reference was made to s. 130 of the Law of Property Act, 1925, and the Administration of Estates Act, 1925, s. 45, sub-s. 2. I have already given reasons why I do not conceive it open to me to treat Thomas John Price as having acquired an entailed interest in personalty. But the conclusive answer to my mind to the claim by the gavelkind heirs is that the enfranchisement destroyed the gavelkind nature of the land (Act of 1922, Sch. 12, para. 1 (*d*)); and I cannot reconcile this destruction with the existence after December 31, 1925, of any possibility of descent upon persons

(1) [1897] 2 Ch. 509.

who can claim only as gavelkind heirs. A further answer is that, if Thomas John Price (contrary to my view) acquired an entailed interest in personalty, s. 130, sub-s. 4, of the Law of Property Act, 1925, causes that interest to devolve on his death as if the entailed interest had been limited in respect of freehold governed by the general law in force immediately before the commencement of the Act. That effectually prevents any descent or devolution upon gavelkind heirs.

The next claimant I have to deal with is Alfred George Price, next brother to Thomas John Price. His claim as a gavelkind heir stands or falls with the claims of Douglas, Ernest and Alfred, and I need say no more as to his claim in that capacity. It was however most ingeniously argued for him that he could take as the heir of the body of Elizabeth at common law in respect of this particular one-ninth. The argument assumes, of course, contrary to the view I have expressed above, that Thomas John Price can be treated as having at the date of his death, an entailed interest which will pass by force of the entail to the heir of the body of Elizabeth. The argument then proceeds as follows: (*a*) under the Inheritance Act issue of deceased heirs stand in place of their parent: *In re Matson* (1)); (*b*) thus any estate tail which Thomas Price took by force of the entail will pass to issue of his in preference to those outside his own issue; (*c*) descent, on Thomas John Price's death, will no doubt be to an heir at common law and not to a gavelkind heir; but (*d*) Alfred George Price is the common law heir of Elizabeth for the purpose of a descent which has to be traced through Thomas Price, since he represents his father Thomas Price, who in his day (before the Act of 1925 came into force) was the heir, qua this one-ninth, of Elizabeth. The fallacy seems to me to lie in this, that while admitting that, after the commencement of the Act of 1922, Sch. 12, para. 1 (*d*), no descent by gavelkind custom is possible, Alfred George Price seeks to establish his heirship, on the occasion of a descent which takes place after that commencement, by showing that he stands in place

(1) [1897] 2 Ch. 509.

CLAUSON J. 1928 PRICE, *In re.*

of an heir, namely, his father Thomas Price, who was a gavelkind heir and is not a person who is in the line of descent in which alone the common law heir of Elizabeth can be traced. The point may be put more simply by saying that Alfred George traces his heirship by the common law up to his father Thomas, but, upwards from Thomas to Elizabeth by the gavelkind custom. It appears to me that any one claiming as heir of the body of Elizabeth at common law must trace his descent from Elizabeth by the common law rules and not by gavelkind rules part of the way and common law rules for the rest of the journey.

That leaves me with Rachel Jane Holmes as the only remaining claimant on this summons, the executors of Thomas John Price not being parties. The argument in her favour, assuming that Thomas John Price had at his death an entailed interest under the original entail to Elizabeth and the heirs of her body by William, seems to me to be overwhelming, for Rachel was undoubtedly, at Thomas John Price's death, the heir at common law of the body of Elizabeth by William : and so, if the choice lies between her and the other parties to the summons, she must, as it seems to me, succeed. But this very circumstance appears to me to be some indication, though possibly a slight one, of the correctness of the view which I have already indicated that Thomas John Price by the Act acquired an absolute interest which on his death passed to his executors. It is not surprising that the framers of the Act should prefer that an entailed interest in an undivided share in copyholds (which would usually arise from some gavelkind devolution) should become an absolute interest in personalty in preference to passing away to more or less distant relations, as would often be the case, if the need of tracing heirship were retained while the principle on which it is to be traced is fundamentally changed.

It follows that, in the view that I take of the Acts, all the parties before me fail. At a late period in the argument, and in deference to doubts which I suggested as to the correctness of the view supported by all the counsel before me, that Thomas John Price's executors had no possible claim, it was

suggested that I should order the summons to stand over in order to add those executors as parties. I thought it best to conclude the hearing without taking that step, so as to save costs. In my judgment, however, it is now necessary to add them as parties, first, because in their absence it would scarcely be possible for the Court of Appeal to deal with the case, and, secondly, because in their absence I cannot make a satisfactory order as to costs. Accordingly I will to-day direct the summons to be amended by adding the executors as parties. If, when joined and served they enter appearance, and are willing to acquiesce in the order which I am about to mention, an order will be drawn up (dated after the entry of the executors' appearance) declaring that in the events which have happened the one-ninth share, in the proceeds of sale and net rents and profits until sale of the lands in the summons mentioned which corresponds to the one-ninth share in which previously to January 1, 1926, Thomas John Price had an estate of inheritance in possession, passed on his death on January 28, 1926, to his executors as part of his estate.

Solicitors: *Helder, Roberts, Giles & Co., for Dauncey & Co., Tredegar, Monmouthshire; Seeley & Son.*

H. C. H.

TOMLIN J.

1928

April 27; *May* 2.

In re SPENCER AND HAUSER'S CONTRACT.

[1927. S. 3983.]

Vendor and Purchaser—Sale by Auction—Contract—Title—Vendors contracting to sell as "Trustees for Sale" under a Will—No Trust for Sale in Will—Offer to sell as "personal representatives"—Form of making Title not essential—Assent by personal Representatives—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *ss.* 36, 39.

By special conditions of sale, subject to which two freehold dwelling-houses were sold by auction, it was (inter alia) stated that the vendors were selling as "trustees for sale" under the will of R. E. E. S. On the examination of the title by the purchaser, it appeared, however, that no trust for sale was contained in the will in question.

The purchaser having taken the objection that, such being the case, the vendors had no right to sell or convey the property at all, the vendors asserted that the statement that they were selling as trustees for sale was due to an error; that they could make a good title, notwithstanding this erroneous statement, by conveying as the legal personal representatives of R. E. E. S.; and that the purchasers were not entitled to repudiate the contract.

Held, on a vendor and purchaser summons being taken out, that such a statement did not affect the power of the vendors to make a good title, and that the condition in the contract did not amount to a warranty by the vendors as to the particular form in which title would be made, but it only indicated the method in which the vendors contemplated making a title. As the vendors, therefore, were able to make a good title, they could compel the purchaser to carry out the contract.

In re Baker and Selmon's Contract [1907] 1 Ch. 238 followed.

VENDOR AND PURCHASER SUMMONS.

On July 27, 1927, two freehold dwelling-houses, Nos. 42 and 44 Bridge Street, Llandaff, and described in the particulars and conditions of sale as Lot 5, were put up for sale by auction at Cardiff. At the sale one Abraham Hauser was declared to be the highest bidder and the purchaser thereof for 730*l.*; and the contract was, immediately after the said sale, duly signed, both by the said A. Hauser and the vendors' agent; and the sum of 73*l.*, being a deposit of 10 per cent. was duly paid, as required by the conditions of sale of the property. By the special conditions of sale it was (inter alia) provided that the property was sold subject to the general conditions of 1925 so far as they were not varied by or inconsistent

with the special conditions, and that the vendors were selling as thereinafter mentioned in respect of each separate lot.

Clause 5 stated that the abstract of title should commence as to each of Lots . . . . 5 . . . . with the will of Richard Evans Spencer proved . . . . on March 27, 1901, and that as to Lots . . . . 5 . . . . the purchaser should assume without proof and without requisition or objection that the said R. E. Spencer was at all material times seised of or otherwise entitled thereto for an estate in fee simple in possession free from incumbrances. Clause 6 provided (inter alia) as follows: "The vendors or vendor as the case may be are or is selling . . . . as to Lots . . . . 5 . . . . as trustees for sale under the will of Richard Elias Evans Spencer, who died on April 22, 1923."

On or about August 10, 1927, the vendors delivered an abstract of title to the purchaser's solicitors in respect of Lot 5; the said abstract beginning with the will, dated September 21, 1899, of Richard Evans Spencer. The purchaser's requisitions and objections on the vendors' title were duly sent in on August 23, requisition 1 being as follows: "The vendors purport to sell as trustees for sale under the will of Richard Elias Evans Spencer. There is no trust for sale contained in the said will and that being so, the vendors have no right to sell and still less to convey the property. They are therefore unable to carry out the contract which they have entered into and the purchaser requires the repayment of his deposit and the sale fees with interest and costs."

The vendors' solicitors replied to this particular requisition in the form of a letter dated August 30, 1927, in which they pointed out that the insertion of the words "trustees for sale" was an error and should have been "personal representatives," and they further stated: "It does not appear that there is any material difficulty to be got over; the 'personal representatives' and the 'trustees with a power of sale' of the will of the late R. E. E. Spencer are the same persons and the implied covenants in whichever capacity they convey will be the same. But the parties interested are prepared to meet the question quite fairly and if the purchaser prefers

TOMLIN J. 1928 SPENCER AND HAUSER'S CONTRACT, *In re.*

it, an assent by Charles St. D. Spencer as legal personal representative of R. E. Spencer deceased and a vesting deed by the vendors in favour of Mrs. A. M. Spencer (the widow of the testator R. E. E. Spencer and the tenant for life under the will) will be executed and Mrs. Spencer will then convey as 'estate owner' under the Settled Land Act, 1925, the purchase money being paid to the trustees of the will of R. E. E. Spencer."

Correspondence ensued between the vendors' and purchaser's respective solicitors, the purchaser maintaining that the vendors had sold as trustees for sale which in fact they were not, and as such had clearly no right to sell and convey the property to the purchaser, who was consequently entitled to a return of his deposit. Further, the purchaser stated that he was unable to adopt the suggestion made by the vendors, as it would mean entering into a new contract for the purchase of the property, which he was unwilling to do; nor could he be compelled by the vendors to take a new contract from the tenant for life. The vendors contended that a good and sufficient title was shown by the abstract and could be given by their conveying as personal representatives, and they further stated that they were prepared to make a statement in writing that no assent or conveyance had been given in respect of the legal estate in accordance with the Administration of Estates Act, 1925, s. 36, sub-s. 6.

An originating summons was accordingly taken out by the vendors under the Law of Property Act, 1925, s. 49, for a declaration that the objection of the respondent (the purchaser) to the title to the property comprised in the contract dated July 27, 1927, for the sale of Lot 5 had been sufficiently answered by the applicants (the vendors), and that a good title to the said property had been shown by the applicants as personal representatives of Richard Elias Evans Spencer deceased notwithstanding that by error they were stated in the said contract to sell as trustees of his will.

A. F. Topham K.C. and *F. McMullan* for the vendors. The vendors, although they have no trust for sale as stated

in the contract, can make a good title in a different way, that is by conveying as personal representatives; they have the legal estate. The vendors of course must show they have a good title, and if they can do that, even though they contract to sell in a certain capacity, and afterwards find they cannot, the purchaser gets protection, and he can be compelled to carry out the contract. The case of *In re Baker and Selmon's Contract* (1) is strongly relied on: and it was further referred to with approval in *In re Atkinson and Horsell's Contract.*(2)

[TOMLIN J. There is a difference between contracting as a trustee for sale and in some other capacity.]

A good title can be made in a particular way, and one in accordance with the conditions of the contract. The fact that the vendors contracted to sell as trustees for sale and are unable to do so, cannot affect the title if they can make a good one in another capacity. It is not forcing a new title on the purchaser. The position here is stronger than where, as in *In re Baker and Selmon's Contract* (3), the vendor is in the position to compel a beneficiary to join in the conveyance. The general principle is stated by Cozens-Hardy M.R. in *In re Atkinson and Horsell's Contract.* (4)

[TOMLIN J. It may be that if a man contracts to make a title in a certain capacity and cannot, he may not be able to carry out his contract. Here the vendors may have to go behind their root of title to make any title at all.]

The contract says the abstract is to begin with a particular will (condition 5), but even if it is not the will under which, by condition 6, the vendors contracted to sell as trustees for sale, a good title can be made by conveying as personal representatives under the first abstracted document, and the purchaser cannot refuse to complete, and his contention is not justified. The vendors have carried out what they are obliged to do; they have satisfied their obligation to show a good title. The fact that they have described themselves as "trustees for sale" is a mere misdescription and is not material, nor can it give the purchaser any right to repudiate.

(1) [1907] 1 Ch. 238.
(2) [1912] 2 Ch. 1, 7, 11.
(3) [1907] 1 Ch. 238, 243.
(4) [1912] 2 Ch. 9, 10.

TOMLIN J. 1928 SPENCER AND HAUSER'S CONTRACT, *In re.*

In re Baker and Selmon's Contract (1) is an authority that if a vendor sells in a different capacity from that which he contracted to do, it makes no difference. That case was followed by Astbury J. in *In re Hailes and Hutchinson's Contract* (2), where he applies the same principles, and one must regard also Cotton L.J.'s remarks in *In re Bryant and Barningham's Contract.* (3) If the vendors can make a title as legal personal representatives, they can give a good title. See the Administration of Estates Act, 1925, s. 39, which is in the vendors' favour; here the vendors are legal personal representatives, they have not yet assented and have all the powers conferred by the section. As such they have the same powers as trustees for sale. The vendors made an offer under s. 36 of the Act, and if the vendors say there has been no assent, the purchaser gets protection. Both s. 39 and s. 36 of the Administration of Estates Act, 1925, are in point and are relied on by the vendors.

C. J. W. Farwell K.C. and *W. Hunt* for the purchaser. The vendors are not able to show a good title according to the contract. The question is really one of the construction of the particular contract itself. The authorities cited in support of the vendors' contention do not go as far as the vendors allege, and there is no case which says that a vendor can force a sale on a purchaser in another capacity than that in which he contracts to sell. If these vendors cannot sell as trustees for sale, they cannot make a title, the purchaser cannot be compelled to enter into a new contract. The case of *In re Baker and Selmon's Contract* (1) is not really applicable. Further, any question of the vendors being able to sell because they have an implied authority to pay debts as personal representatives should not be considered: *In re Head's Trustees and Macdonald.* (4)

[TOMLIN J. The real question here is whether on the true construction of this contract, the vendors can make a title in another way than that which they contracted to do.]

Yes, but none of the cases support this view and it is

(1) [1907] 1 Ch. 238.
(2) [1920] 1 Ch. 233.
(3) (1890) 44 Ch. D. 218, 223.
(4) (1890) 45 Ch. D. 310, 315.

submitted the vendors cannot do so. They cannot force the purchaser to make an investigation of any title beyond what was agreed to by the contract: they have contracted to sell in a particular capacity and they can only make a title under the contract in that capacity.

Topham K.C. in reply.

TOMLIN J. This is an application by certain vendors to have it declared that "the objections of the respondent to the title to the property comprised in the above mentioned contract have been sufficiently answered by the applicants and that a good title to the said property has been shewn by the applicants as personal representatives of Richard Elias Evans Spencer deceased notwithstanding that by error they were stated in the said contract to sell as trustees of his will." The contract, which was dated July 27, 1927, provides by a memorandum at the end of certain particulars and conditions of sale, that it is expressed to be made between the vendors by name and the purchaser, "whereby it is agreed that the vendors shall sell and the purchaser shall purchase the property, lot 5, described in the above particulars at the price of 730*l.* (independently of any valuation money) subject to the foregoing special conditions of sale and the general conditions of sale of 1925." Nothing turns, I think, on the particulars.

The special conditions of sale provide that: [His Lordship read the material portions of the special conditions as substantially set out above]. I do not think that there are really any other of the special conditions or any of the general conditions which are material for me to refer to. By an error of the draftsman of the special conditions, the vendors were stated to be selling as trustees for sale under the will of Richard Elias Evans Spencer, whereas in fact they had no trust for sale under that will, but they were the legal personal representatives of that particular testator. How the error arose I do not think it is really material to state, it obviously was an error. If the draftsman had had present to his mind the true position, there is no doubt

TOMLIN J. 1928 SPENCER AND HAUSER'S CONTRACT, *In re.*

he would have stated that they were selling as legal personal representatives of the testator instead of as trustees for sale.

Now the position of a legal personal representative of a person who dies before January 1, 1926, is this. In the first place, under the Land Transfer Act, 1897, the powers of sale of a legal personal representative in respect of real estate are similar to those of an executor in respect of chattels real. Under the Administration of Estates Act, 1925, he has also certain powers, but whether they are additional powers or merely declaratory of his existing powers, it is not necessary for me to say now. At any rate some of his powers are expounded more elaborately in the Administration of Estates Act, 1925, than they were in the Land Transfer Act, 1897. Under the Administration of Estates Act, 1925, s. 39, it is provided as follows. (1) [His Lordship read the section.] That section applies to this case before me. Sect. 36, which deals with assents, says: sub-s. 1: "A personal representative may assent to the vesting, in any person who (whether by devise, bequest, devolution, appropriation or otherwise) may be entitled thereto, either beneficially or as a trustee or personal representative, of any estate or

(1) Administration of Estates Act, 1925, s. 39 (1.): "In dealing with the real and personal estate of the deceased his personal representatives shall, for purposes of administration, or during a minority of any beneficiary or the subsistence of any life interest, or until the period of distribution arrives, have—

(i.) The same powers and discretions, including power to raise money by mortgage or charge (whether or not by deposit of documents), as a personal representative had before the commencement of this Act, with respect to personal estate vested in him, ..."

"(ii.) All the powers, discretions and duties conferred or imposed by law on trustees holding land upon an effectual trust for sale (including power to overreach equitable interests and powers as if the same affected the proceeds of sale); and

(iii.) All the powers conferred by statute on trustees for sale, and so that every contract entered into by a personal representative shall be binding on and be enforceable against and by the personal representative for the time being of the deceased, and may be carried into effect, or be varied or rescinded by him, and in the case of a contract entered into by a predecessor, as if it had been entered into by himself."

(2.): "Nothing in this section shall affect the right of any person to require an assent or conveyance to be made."

(3.): "This section applies whether the testator or intestate died before or after the commencement of this Act."

interest in real estate to which the testator or intestate was entitled or over which he exercised a general power of appointment by his will. . . . ." Then sub-s. 2 provides as to the effect of that assent, and sub-s. 3 is: "The statutory covenants implied by a person being expressed to convey as personal representative, may be implied in an assent in like manner as in a conveyance by deed." Sub s. 4 relates to assents to the vesting of a legal estate being in writing and so on, and operates to vest the legal estate; and sub-s. 5 is as follows: "Any person in whose favour an assent or conveyance of a legal estate is made by a personal representative may require that notice of the assent or conveyance be written or endorsed on or permanently annexed to the probate or letters of administration. . . . ."

By sub-s. 6 it is laid down: "A statement in writing by a personal representative that he has not given or made an assent or conveyance in respect of a legal estate, shall, in favour of a purchaser, but without prejudice to any previous disposition made in favour of another purchaser deriving title mediately or immediately under the personal representative, be sufficient evidence that an assent or conveyance has not been given or made in respect of the legal estate to which the statement relates, unless notice of a previous assent or conveyance affecting that estate has been placed on or annexed to the probate or administration." Then sub-s. 8 provides: "A conveyance of a legal estate by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have been discharged or provided for," and by sub-s. 12, it is laid down: "This section applies to assents and conveyances made after the commencement of this Act, whether the testator or intestate died before or after such commencement."

I think it may fairly be said, as the result of these provisions, that where a personal representative selling land states that there has been no assent, the purchaser is not bound to make any inquiry about the debts or funeral and

TOMLIN J. 1928 SPENCER AND HAUSER'S CONTRACT, *In re.*

testamentary expenses and is bound to accept the title, and indeed by reason of s. 36, sub-s. 8, the mere fact that the purchaser had notice that all debts had been paid does not invalidate the title. Now so far as these vendors are concerned, the point is not that they could not make a good title as personal representatives of the testator, but is whether, having regard to the form of this particular contract, they are bound to make a title in a particular way—namely, as trustees for sale under his will, meaning thereby no doubt trustees exercising an express trust for sale created by the will—and, if they cannot make a title in that way—although they may make a perfectly good title as legal representatives —whether the purchaser is entitled to repudiate the contract; that is the question I have to decide.

I think this, at least, is plain, that where a man enters into a contract to sell land, stating that his title will commence with a certain document and saying nothing more, he may make a title to the purchaser in any way he can, that is to say, the purchaser will be bound to accept a good title from him in whatever form it may be presented, always assuming that that good title is made either by the vendor alone or with the concurrence of some persons whom he can compel to join in the conveyance. That seems to me to be reasonably plain. But if the contract contains something more, for instance if the vendor says: "I am going to make a title to you in some particular capacity," then the question arises, whether that amounts to a warranty by him that he will make the title in that way; and, however good the title may be which he tenders, whether that title can be forced on the purchaser unless in accordance with the alleged warranty.

The effect of every contract, of course, must depend upon its construction, and the first question that must arise when a contract contains some reference to the capacity in which the vendor is going to make a title is whether there is a warranty that he will make the title in that form, or whether it is only indicative of the way in which he is proposing to make a title—his contract merely being to make a good title. Now it seems to me, having regard to the general law as to

contracts for the sale of real estate, and to the fact that the provisions of that law are really based upon this, that title to land is an uncertain matter and that nobody can be quite sure until the last moment (that is, at any rate, before January 1, 1926) whether he had any title to land at all: that it would be a strange construction to imply in any contract for the sale of land—unless absolutely driven to it by the language—a warranty by the vendor that he was making a title in a particular form. So far as this contract is concerned, I do not feel myself able, having regard to the form of the contract, to hold that it does anything more than indicate the method in which the vendor is contemplating making a title, although of course he takes upon himself the obligation of making a good title. This view of the contract is I think supported by the decision of Swinfen Eady J. in *In re Baker and Selmon's Contract* (1), which was afterwards referred to with approval by the Court of Appeal in *In re Atkinson and Horsell's Contract.* (2) In *In re Baker and Selmon's Contract* (3), the 7th condition was as follows: "The vendor of lots 1 and 2 who is the trustee under the will of the said James Baker deceased is selling the said properties under the trusts and powers vested in him thereunder and shall not be required to enter into any covenant other than that implied by his conveying in such capacity as aforesaid." The learned judge in his judgment (4) said: "If the 7th condition stood alone, the proper inference would be that the vendor was selling as trustee of the will under a power or trust for sale exercisable at the date of the contract." Then he says that it must be read with the previous provision, which was: "The tenant for life of lot 1 will join in the conveyance to the purchaser for the purpose of releasing her life interest therein," and he continues: "This provision would be unnecessary if the vendor had an immediate power of or trust for sale It points rather to a power or trust that has not yet arisen, with the idea that it could be accelerated. At all events, it shows that the

(1) [1907] 1 Ch. 238.
(2) [1912] 2 Ch. 1.
(3) [1907] 1 Ch. 242.
(4) [1907] 1 Ch. 238, 242.

TOMLIN J. 1928 SPENCER AND HAUSER'S CONTRACT, *In re.*

concurrence of at least one beneficiary was necessary, and militates against the suggestion that the vendor could sell under a power or trust without the concurrence of any beneficiary. The purchaser having objected to the title, the vendor and the beneficiaries, of whom he is one, have issued this summons. In my opinion, the beneficiaries having authorized and requested the vendor trustee in writing to sell the property, and the vendor having entered into the contract in pursuance of that written authority, the beneficiaries were legally bound to carry out the contract and concur in the conveyance. The vendor, who had sold at their written request, could compel them to join to enable him to carry out the contract. Seeing, therefore, that at the date of the contract the legal estate was vested in the vendor as trustee, that he had the written request of all the beneficiaries to sell, and entered into the contract in pursuance of that request, so that he had a right to compel their concurrence, I am of opinion that the vendor has shown a good title." In other words, he decided that whether the contract is one by a vendor to sell as a trustee under a trust for sale accelerated by the release of the interest of the tenant for life or whether it be merely a contract to sell with the concurrence of one beneficiary, at any rate a good title can be made in a wholly different way—namely, by somebody who has the legal estate together with the concurrence (which he can compel) of all those who are beneficially interested. It seems to me that what that means is this : that a contract containing a clause indicating how the title is proposed to be made is indicative only of the vendor's intention and is not a warranty to make a good title in the particular form that is mentioned. In other words the learned judge in *In re Baker and Selmon's Contract* (1) took the same view that I take in this case. I think therefore the vendors in this case are right and can compel the purchaser to accept the title.

Solicitors : *Crossman, Block, Matthews & Crossman, for Stanton, Atkinson & Bird, Newcastle-on-Tyne ; Bell, Brodrick & Gray, for Cousins, Botsford & Co., Cardiff.*

(1) [1907] 1 Ch. 238, 242.

A. R. T.

In re WINDSOR STEAM COAL COMPANY (1901), LIMITED.

MAUGHAM J.

1928

April 24, 25.

[00124 of 1927.]

Company—Liquidation—Misfeasance of Liquidator—No wilful Default—Indemnity of Liquidator—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *s.* 24—*Trustee Act*, 1925 (15 *Geo.* 5, *c.* 19), *s.* 30, *sub-s.* 1; *s.* 68, *sub-s.* 17.

A voluntary liquidator of a company is not a trustee within the meaning of s. 68, sub-s. 17, of the Trustee Act, 1925, and is therefore not entitled to the indemnity given to trustees by s. 30, sub-s. 1.

MISFEASANCE SUMMONS.

Under an agreement dated October 16, 1919, the Windsor Coal Company appointed a firm sole selling agents of the output of their colliery for the term of twenty-one years. The company agreed "to pay the agents as remuneration for their services upon the coal raised and sold, and on the coal raised and coked in each year, the sum of 3*d.* per ton up to 200,000 tons, and upon the balance 2*d.* per ton." The company did not carry on business at a profit, and on May 27, 1925, entered into a contract to sell its undertaking to another colliery company, and some months later went into liquidation, the respondent, Richard Henry March, being appointed liquidator for the purpose of winding it up. The firm, asserting that the company had committed a breach of contract by selling their undertaking to the colliery company, claimed to prove in the winding up for their commission which they had failed to earn. According to the decision of the judge (which is not reported on this point) the company had committed no breach, and the firm was entitled to no damages; but the liquidator purported to settle the claim by the payment of 15,000*l.* The only legal advice the liquidator took was that he obtained the views of the solicitors of a large shareholder in the company who said that in their opinion the firm was entitled to damages, but that the amount was another matter. The liquidator had acted honestly in the transaction, and claimed to be protected by s. 30 of the Trustee Act, 1925. This

MAUGHAM J. 1928 WINDSOR STEAM COAL CO. (1901), *In re.*

summons was taken out by a contributory to the company, and a declaration was asked for that the respondent as liquidator had been guilty of misfeasance and a breach of trust in paying the 15,000*l.*

Topham K.C. and *R. J. T. Gibson* for the respondent. Under s. 30 of the Trustee Act, 1925, a trustee is only answerable for his own acts and for moneys or securities actually received by him. He is not liable "for any other loss, unless the same happens through his wilful default." Directors of a company are trustees of moneys of the company which come into their hands: *In re Lands Allotment Co.* (1) It is submitted that a liquidator is in the same position. As was pointed out by Romer J. in *Knowles* v. *Scott* (2) for certain purposes a liquidator may fairly be described as a trustee. It is submitted that a liquidator comes within the definition of trustee in s. 68, sub-s. 17, of the Trustee Act, 1925. If so he is not liable for the loss of the 15,000*l.*, unless it was caused by his wilful default. A person is not guilty of wilful default unless he is conscious that in doing the act which is complained of he is committing a breach of his duty or is recklessly careless whether it is a breach of duty or not: *In re City Equitable Fire Insurance Co.* (3) In this case it is admitted the liquidator made an honest mistake.

Gavin Simonds K.C. and *Lionel Cohen* for the respondent. A liquidator is not a constructive trustee within s. 68, sub-s. 17, of the Trustee Act, 1925: see Lewin On Trusts, 13th ed., p. 191. A voluntary liquidator is not a trustee but an agent of the company: *Knowles* v. *Scott.* (4) Decisions on the duties of trustees should not be applied to the conduct of persons in the position of auditors: *In re City Equitable Fire Insurance Co.* (5) It is submitted that the same rule should be applied to liquidators. Although the indemnity given to trustees by s. 30 of the Trustee Act, 1925, is the same as that given by s. 24 of the Trustee Act,

(1) [1894] 1 Ch. 616.
(2) [1891] 1 Ch. 717, 722.
(3) [1925] Ch. 407, 525.
(4) [1891] 1 Ch. 717, 723.
(5) [1925] Ch. 407, 523, 525.

1893, there is no case in which a liquidator has been held to be protected by the latter section. In this case the respondent has been recklessly careless, and has therefore been guilty of wilful default: *In re City Equitable Fire Insurance Co.* (1)

MAUGHAM J. It is suggested that the liquidator, who has paid the sum of 15,000*l.* to a firm which was not entitled to it, is protected by s. 30, sub-s. 1, of the Trustee Act, 1925. The section is in these terms: "A trustee shall be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default."

The final words are the same as those in s. 24 of the Trustee Act, 1893.

The first question which arises is whether a liquidator is a trustee within the definition contained in the Trustee Act, 1925. Under s. 68, sub-s. 17, "'trust' does not include the duties incident to an estate conveyed by way of mortgage, but with this exception the expressions 'trust' and 'trustee' extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of a personal representative."

I confess I have some doubt as to whether the language of the definition is not wide enough to include a liquidator who, from some aspects, is undoubtedly a trustee. He is not, of course, in all respects a trustee. For example, he does not perform his duties as a trustee. I accept the view taken in various cases, and by Romer J. (as he then was) in *Knowles* v. *Scott* (2), where he said: "In my view a

(1) [1925] Ch. 407, 523, 525. (2) [1891] 1 Ch. 717, 723.

MAUGHAM J. 1928 WINDSOR STEAM COAL CO. (1901), *In re.*

voluntary liquidator is more rightly described as the agent of the company—an agent who has, no doubt, cast upon him by statute and otherwise special duties, amongst which may be mentioned the duty of applying the company's assets in paying creditors and distributing the surplus among the shareholders. James L.J. referred to this as being his true position in the case of *In re Anglo-Moravian Hungarian Junction Ry. Co.*" (1)

Mr. Topham argued that a director of a company was protected by s. 30, sub-s. 1, and that therefore it was difficult to see why a liquidator was not also protected. He relied on *In re Lands Allotment Co.* (2), a decision of the Court of Appeal, where it was held that the directors of a company are trustees of moneys of the company which have come into their hands or are under their control within the meaning of the Trustee Act, 1888, s. 1, sub-s. 3, and therefore can, in the absence of fraud, take advantage of the Statute of Limitations in proceedings against them for misapplication of the funds of the company.

There is, however, a wide difference between the position of a director and a liquidator; and in particular the position of a liquidator is, in such a case as the present, that of a professional man employed for reward to carry out certain duties which, in a large measure, are statutory. If it is to be held that he is not liable, if he pays away money to some one who is not entitled to participate in the funds of the company he is engaged in liquidating, unless it can be established that he has in some way been guilty of wilful default within the meaning of the term as explained by the Court of Appeal in *In re City Equitable Fire Insurance Co.* (3), it must be done by some tribunal superior to this. Moreover, I think that neither directors nor liquidators, speaking generally, are to be regarded as trustees within the meaning of the Trustee Acts: see the observations of Warrington L.J. [1925] Ch. 523, 524. For many years past the liability of directors and of liquidators has been ascertained upon the footing that

(1) (1875) 1 Ch. D. 130, 133. (2) [1894] 1 Ch. 616.
(3) [1925] Ch. 407.

they were not entitled to avail themselves of the protection of the old section in the Trustee Act, 1893, and by parity of reasoning, they are not entitled to the protection of s. 30 of the Trustee Act, 1925. I am unable to hold that a liquidator who, without obtaining the sanction or authority of the Court, has paid away the sum of 15,000*l.* to some one who had no claim to it whatever, has properly discharged himself of that sum.

It is not necessary for me to determine whether the words, "his own wilful default," in s. 30 of the Trustee Act, 1925, have, in the case of a trustee ordinarily so called, precisely the same significance as the Court of Appeal have attached to those words as contained in an article of association in the case of a director or of an auditor. It may be so; it may not be so. My judgment on this part of the case is founded upon the view that a liquidator who has statutory duties to perform is not entitled to protect himself under s. 30 of the Trustee Act, 1925, if he pays away the moneys of the company by mistake, even though it be, as it is here, an honest mistake, to some persons who are not entitled to them.

Accordingly I think, without going further into the numerous cases which have been cited to me, it is my duty to make an order upon the summons, and I think the order must be that the respondent must repay the 15,000*l.* with interest at 5 per cent.

Solicitors: *Churchill, Clapham & Co., for Elfyn David & Hamblen, Cardiff; Ingledew, Sons & Brown, for Downing & Handcock, Cardiff.*

J. B. B. M.

C. A.
1927
EVE J.
Nov. 23, 24, 25;
Dec. 16, 19.
C. A.
1928
April 20, 23.

In re BLACKWELL.

BLACKWELL *v.* BLACKWELL.

[1926. B. 5324.]

Will—Codicil—Legacy on secret Trust—Detailed verbal Instructions by Testator to One of several Trustees—Names of Beneficiaries—Written Memorandum on same Date as Execution of Codicil—Knowledge and Acceptance of Trust by all Trustees—Admissibility of parol Evidence—Validity of Trust Legacy.

A testator by a codicil to his will executed by him after he had become physically but not mentally incapable, gave to his five friends 12,000*l.* upon trust to invest the same as they should think fit, and apply the yearly income "for the purposes indicated by me to them," with power to pay over the capital sum of 8000*l.* "to such person or persons indicated by me to them" as they thought fit, and to pay the balance of 4000*l.* to the trustees of his will to be held as part of his residuary estate. Detailed parol instructions for this codicil were given by the testator to C., one of the five friends, and the object of the trust was known in outline to and accepted by all the rest before the execution of the codicil. On the same day, soon after the execution of the codicil, C. wrote out and signed a memorandum of the instructions given to him to the effect (inter alia) that the interest of the 12,000*l.* was to be paid to a lady, whose name and full address were given, for the benefit of her and her son, whose full name followed. In an action by the widow of the testator and her son against the trustees and beneficiaries to test the validity of the trust legacy of 12,000*l.*:—

Held, by the Court of Appeal (affirming the decision of Eve J.) that parol evidence was admissible to establish the trust on the authority of *In re Fleetwood* (1880) 15 Ch. D. 594, which had been approved by the Court of Appeal in *In re Huxtable* [1902] 2 Ch. 793.

Held, also, that a complete valid and consistent trust of this pecuniary legacy for the lady and her son had been established by the codicil and the memorandum of even date.

WITNESS ACTION.

The plaintiffs in this action were Frances Evelyn Blackwell, the widow of the testator J. D. Blackwell, and her son, John Duncan Blackwell, the younger. The first two defendants, William Ernest Blackwell and Benjamin Sinclair Blackwell, were sued as legal personal representatives of the testator. The next five defendants, M. Oliver, A. E. Harrison, F. Wettern, E. W. Barnett, and William Percy Cowley,

were sued as trustees of a secret trust legacy bequeathed by the fourth codicil to the will of the testator; and the last two defendants were a lady and her son, an infant of sixteen years of age, who were the beneficiaries under the trust legacy.

The testator was a business man of Manchester, and was also possessed of property in the Isle of Man. On December 4, 1924, he had a serious seizure, which rendered him physically but not mentally incapable. By his will dated January 1, 1925, the testator appointed his wife, the plaintiff Frances Evelyn Blackwell, and his brothers, the defendants W. E. Blackwell and B. S. Blackwell, executors and trustees thereof, and he devised and bequeathed all his real and personal estate unto his trustees upon trust to sell and convert, and as to the income of the proceeds of such sale and conversion to hold one moiety thereof upon trust for his widow F. E. Blackwell for life, and as to the remaining moiety thereof upon trust as to one-half for the testator's son J. D. Blackwell the younger, during the life of F. E. Blackwell, and as to the remaining half of such last mentioned moiety upon trust for the testator's daughter, Evelyn Edwards Evans, during the life of F. E. Blackwell, and after the death of the latter to stand possessed of both the capital and income of his estate upon trust for his said son J. D. Blackwell and his daughter E. E. Evans in equal shares absolutely. The testator made a first codicil not material to this action and a second codicil dated January 15, 1925, whereby he directed that on the death of F. E. Blackwell his estate should be held upon the trusts therein mentioned for the plaintiff J. D. Blackwell and his daughter E. E. Evans and their children respectively, and if both his son and daughter should die without leaving any children the whole of the estate should go and belong in equal shares to the testator's brothers and sisters. After the seizure in 1924 the testator lay in a physically helpless condition, but was not mentally incapable of understanding business. By a third codicil dated February 13, 1925, the testator gave his son and daughter respectively power to make provision as therein mentioned for a wife or husband, as the case might

C. A. 1927

BLACKWELL, *In re.* BLACKWELL *v.* BLACKWELL.

be. The testator made a fourth codicil also dated February 13, 1925, in the following terms: "I give and bequeath to my friends Mark Oliver, Arthur Ernest Harrison, Fred Wettern, Edward Watson Barnett and William Percy Cowley the sum of 12,000*l.* free of all duties upon trust to invest the same as they in their uncontrolled discretion shall think fit and to apply the income and interest arising therefrom yearly and every year for the purposes indicated by me to them with full power at any time to pay over the capital sum of 8000*l.* to such person or persons indicated by me to them with full power as they think fit, and to pay the balance of 4000*l.* to my trustees as part of my residuary estate and upon the same trusts as are declared in my will and previous codicils. I give and bequeath to each of my said friends hereinbefore named the sum of 100*l.* as legacy free of legacy duty. . . . ." This codicil was executed directly after the third codicil at the end of the interview, the testator in each case making his mark.

The testator died on June 3, 1925, and on September 9, 1925, the will and four codicils were duly proved by the plaintiff F. E. Blackwell and the two first defendants. E. E. Evans died in the testator's lifetime, and the plaintiff J. D. Blackwell was married but had no issue. By para. 7 of the plaintiffs' statement of claim it was alleged that: "No trusts of the said legacy of 12,000*l.* bequeathed by the said fourth codicil were ever indicated to the said defendants, M. Oliver, A. E. Harrison, F. Wettern, E. W. Barnett and W. P. Cowley or any of them in writing or verbally prior to the death of the testator." This fourth codicil was prepared by the defendant W. P. Cowley, who was a member of the Manx Bar, and the plaintiffs alleged that after the testator's death they had made repeated inquiries through their solicitors from the defendant W. P. Cowley and the plaintiff F. E. Blackwell and also from the other trustees whether any verbal or written directions had been given to them or any of them as to the disposition of the said legacy prior to the testator's death. Ultimately on January 15, 1926, they received through their solicitors a memorandum in

writing made by the defendant W. P. Cowley shortly after the execution of the codicil, purporting to be the instructions given to him by the testator prior to the execution of the fourth codicil. The memorandum was as follows, and was headed "In re Mr. J. D. Blackwell." "Memorandum of verbal instructions given to me at execution of codicil, 13/2/25. Income of 12,000*l.* to be paid to," then there was the lady's name and full address, "or applied at discretion of trustees for the benefit of herself and her son," and his full name followed. "At any time trustees may pay over 8000*l.* of capital, either to her or her son or either of them. In such event 4000*l.* is to go back to testator's trustees on same trusts as his residuary estate." This memorandum was signed by W. P. Cowley. Save as aforesaid the plaintiffs said they had been unable to obtain any information as to any directions given by the testator to the trustees as to the trusts upon which the testator desired that this legacy should be held; and that if any written or verbal directions were given (which was not admitted) the same were void for uncertainty or inconsistency. The plaintiffs therefore claimed a declaration that no valid trusts of the legacy of 12,000*l.* were ever declared by the testator in favour of the defendants, the lady and her son, or either of them, or in favour of any other person or persons, and that such legacy ought to be held upon the trusts declared by the will and codicils of the testator concerning his residuary estate. The defendants, by their statement of defence, denied each and all of the allegations in para. 7 of the statement of claim, and stated that the trusts of the legacy of 12,000*l.* bequeathed by the fourth codicil were, prior to the execution of the codicil, declared in detail to the defendant W. P. Cowley, and in outline to the other defendants, M. Oliver, A. E. Harrison, F. Wettern, and E. W. Barnett, and were accepted by all. On January 15, 1926, a copy of the memorandum by the defendant W. P. Cowley, mentioned above, was forwarded to the plaintiffs' solicitors. The trustees considered that the legacy should be held by them upon the trusts so declared.

C. A. 1927

BLACKWELL, *In re.* BLACKWELL *v.* BLACKWELL.

The action came on for hearing before Eve J. on November 23, 1927.

Sir Thomas Hughes K.C., Tom Eastham K.C. and *J. M. Easton* for the plaintiffs. The first issue in this case is whether the alleged secret trust has been sufficiently proved so as to satisfy the Court that it can be incorporated in the legacy. Secondly, if that has been made out, then the question of law arises whether such proof as that can be established by parol evidence. Our case is that there has never been any specific declaration of trust by the testator, such as is necessary in a case of this kind. The cases fall into two classes, the first where a legacy has been left to some one apparently absolutely, and there is no indication that he is to be a trustee, he will then be allowed to keep it for himself. The second class is where the legatee is obviously constituted a trustee under the will, so that in no case can he get the money for himself, in which case he is a trustee for the residuary legatees or the next of kin. It is established that secret trusts must be proved by something taking place before the date of the will, and if it is a written declaration of trust any document which can be identified will be treated as incorporated in the will; but nothing after the date of the will will be admitted. Can evidence be admitted here of oral instructions before the date of the codicil? It is submitted not. That would be in effect to make a will by parol, and be entirely contrary to principle and unsound. For that *Johnson* v. *Ball* (1) is an old and established authority. There are exceptions to that principle in cases where a man is guilty of personal fraud, when he will not be allowed to keep the money for himself, as the Court will not permit the Wills Act to be made an instrument for perpetrating a fraud: *McCormick* v. *Grogan*. (2) There are two cases which may be relied on by the defendants —namely, *In re Fleetwood* (3) and *In re Gardner*. (4) The former case was distinguished by Joyce J. in *In re Hetley* (5),

(1) (1851) 5 De G. & Sm. 85.
(2) (1869) L. R. 4 H. L. 82, 85.
(3) 15 Ch. D. 594.
(4) [1920] 2 Ch. 523.
(5) [1902] 2 Ch. 866.

where there was a gift by a testator of his property to his wife for life with power for her to dispose of it "in accordance with my wishes verbally expressed by me to her," and it was held that parol evidence was inadmissible to show what the verbally expressed wishes were, and that the power of disposition given to the widow was void for uncertainty. Other cases of insufficient descriptions of legacies which were held void for uncertainty are *Grimond (or Macintyre)* v. *Grimond* (1), where there was a bequest to trustees with a power to divide a portion of residue among such charitable or religious institutions as they might select; and *Houston* v. *Burns* (2), where there was a bequest for public purposes to be selected by a third party. It is well settled that the Court will not allow the Wills Act to be used as an instrument for the committal of a fraud. But here no fraud is alleged; there is an incomplete and insufficient compliance with the Act. The parol evidence of Mr. Cowley is not admissible to identify the persons or establish "the purposes" for which this trust was intended and indicated by the testator. Even if the evidence were deemed to be admissible the legacy would still be void for uncertainty.

Gavin Simonds K.C. and *John Bennett* for the seven first defendants. The case is really governed by the decision in *In re Fleetwood* (3), which has been followed and never overruled. A secret trust was there held to have been validly created by parol. It was followed in *In re Gardner* (4), while in *In re Gardom* (5), which was in some ways different from the present case, the point was established that the verbal communication of a secret trust to one of two trustees was sufficient if communicated at or before the date of the will. The evidence in the present case establishes the fact that the trust was communicated in detail to Mr. Cowley and was known in general outline and accepted by all the other trustees before the execution of the codicil; and the memorandum of Mr. Cowley is sufficient to establish the trust. That

(1) [1905] A. C. 124.
(2) [1918] A. C. 337.
(3) 15 Ch. D. 594.
(4) [1920] 2 Ch. 523.
(5) [1914] 1 Ch. 662.

C. A. 1927

BLACKWELL, *In re* BLACKWELL *v.* BLACKWELL.

memorandum supplies the important and necessary information as to the full names and addresses of the lady and her son, thus identifying the beneficiaries to take under the trust and the object of the testator in making it. The parol evidence is therefore admissible, and a valid trust has been established in favour of the beneficiaries in accordance with the codicil and memorandum. In *In re Huxtable* (1), which came first before Farwell J , a testator gave a legacy to a trustee " for the charitable purposes agreed upon between us," and the Court held, following *In re Fleetwood* (2), that parol evidence was admissible to show what the purposes were.

Bennett K.C. and *Raymond Jennings* for the two last defendants. We rely upon the same cases as the trustees of this trust legacy and upon the evidence of Mr. Cowley, which is admissible, and establishes the validity of the legacy in favour of the named lady and her son.

Sir Thomas Hughes K.C. in reply. Where a testator has given property to trustees by his will the trusts of the same must be found either in the will or the codicils, or in some other document that can be regarded as incorporated with the will. That is the only way in which there can be an effective declaration of trust. To allow parol evidence to supplement the will would be to act contrary to the Wills Act. In *In re Hetley* (3) Joyce J. said that parol evidence could not be admitted to show what the verbally expressed wishes of the testator were, and he distinguished *In re Fleetwood.* (2) In *In re Gardner* (4) Warrington L.J. threw some doubt upon the decision in *In re Fleetwood* (2) by saying: " If *In re Fleetwood* (2) was properly decided," parol evidence must be admitted. In the present case there being no clear declaration of trust everything remained uncertain until the arrival of Mr. Cowley. It largely depends upon his evidence, and as some lapses of memory have been brought home to him in the evidence there may be some doubt as to the accuracy of his recollection on what passed in February, 1925,

(1) [1902] 1 Ch. 214.
(2) 15 Ch. D. 594.
(3) [1902] 2 Ch. 866.
(4) [1920] 2 Ch. 523, 532.

where his evidence conflicts with that on behalf of the plaintiffs.

Cur. adv. vult.

Dec. 19. EVE J. For some years prior to his death in June, 1925, the testator, without the knowledge of his wife and family, had had relations with another lady who bore him a son now some sixteen years of age. From time to time, and in particular during the two years immediately prior to his last illness, he had expressed to his intimate friends his desire to make an adequate provision for the lady and her son, and if possible, by some method which would spare them and himself all unnecessary exposure. At one time he contemplated the possibility of effectuating his wish by means of a secret trust to be administered by one of the London banks, but nothing had in fact been done when in December, 1924, he had a seizure, and from that time until his death, six months later, he lay in a more or less helpless condition physically, but not mentally incapable on any of the dates material to this case. On February 4, 1925, he was visited by two of his intimate friends, Mr. Barnett and Mr. Wettern, who knew of the circumstances, and who journeyed from London to Manchester for the interview at the testator's express request. To them he repeated what he had frequently before told them—his desire to provide adequately for the lady and the boy—and stated that he proposed to leave a sum of 12,000*l.* to them and to two other friends, Mr. Oliver and Mr. Harrison, for the benefit of the lady and her son. He asked them to look after the boy and his mother, and to see that the former was properly educated on a public school standard. The two friends agreed to act as trustees, and the testator informed them that he was going to leave each of them 100*l.*—a matter which, as one of them deposed, seemed to give him much pleasure. He stated that the legal part of the business would be carried out by Mr. Percy Cowley. This gentleman, an advocate of the Manx Bar, and high bailiff of Ramsay and Peel, had acted for the testator in relation to his affairs in the Isle of

C. A. 1927

BLACKWELL, *In re.* BLACKWELL *v.* BLACKWELL.

Eve J.

Man, where he owned an estate and residence, and was a friend of some years' standing. Prior to the interview to which I am about to refer Mr. Cowley had no knowledge of the testator's relations with the lady, or of the existence of her or her son. On February 12 the testator expressed so strong a wish to see Mr. Cowley that his family felt constrained to send a telegram asking that gentleman to come at once. The request was backed up by an equally pressing telegram sent by Messrs. Dutton and Methuen, mutual friends of the testator and Mr. Cowley. The latter came over the next day, and after a short interview with Messrs. Dutton and Methuen in Manchester, he reached the testator's residence about 3 o'clock in the afternoon. There had at that time been left with the testator's wife for execution by the testator a third codicil to his will, prepared by his solicitors in Manchester, and before Mr. Cowley went up to the testator's room this codicil was handed to him in order that he might explain its contents to the testator, and if the same were satisfactory, obtain his execution. After a little conversation of a general character, this third codicil was read over and discussed with the testator, and he approved the same. He then informed Mr. Cowley of his desire to make a provision for the lady and her son, whose names and address he stated, and explained the circumstances in which the necessity arose. He stated that he wished to settle a sum of 12,000*l.* for their benefit, and inquired whether it could be done without disclosing their names, that he had already expressed his wishes to his friends, Messrs. Barnett, Wettern and Harrison, and had asked them to act as trustees, and that he would like Mr. Cowley to act with them. Mr. Cowley expressed the opinion that the testator's wishes could be given effect to in the form of a secret trust, and after the testator had instructed him that the 12,000*l.* was to be free of duty, and had given him other instructions, some of which are expressly dealt with by the fourth codicil, and others are not therein specifically mentioned, Mr. Cowley drafted the codicil in question, and went through the same with the testator. Before the codicil was wholly written the testator instructed

Mr. Cowley to add the name of Mr. Mark Oliver as a trustee, and when later on it was being read over, he took exception to the wide wording of the clause relating to payment over of the capital sum of 8000*l.*, and to meet his objection the words "indicated by me" were interlineated.

Mr. Oliver and Mr. Harrison were both old friends of the testator, the former living near him and the latter in London. Both were acquainted with the testator's relations with the lady and cognizant of his desire to make provision for her and her son. It had been frequently discussed between the testator and Mr. Oliver, and on many occasions in and subsequent to 1923 with Mr. Harrison, who had in that year agreed to be a trustee of the trust the testator spoke of creating. He in fact had arranged to accompany Messrs. Barnett and Wettern when they visited the testator on February 4, but was prevented from so doing. He did, however, visit him on the 26th of the same month, when the testator told him that he had settled 12,000*l.* on the lady and the boy, and added, "You are one of the trustees." Mr. Oliver was informed by the testator during his illness that he had decided to leave the lady and her boy 12,000*l.*, and that he wanted him (Mr. Oliver) to be a trustee. Mr. Oliver and Mr. Harrison both assented to act as trustees.

The fourth codicil is in these terms. [His Lordship read the codicil and continued:] The testator died on June 3, 1925, and his will and four codicils were proved by his widow and brothers, the defendants, Messrs. William Ernest and Benjamin Sinclair Blackwell, on the following September 9. Subject to the life interest of the widow in the income of a moiety thereof, the residuary estate in the events which have happened is held upon trust for the testator's son, the plaintiff, Mr. John Duncan Blackwell, for life with remainder, subject to a power to the tenant for life to make provision for a widow to the extent of 300*l.* per annum, to his child or children, or on his death without leaving any children, to the testator's brothers and sisters in equal shares. Mr. John Duncan Blackwell is married, but has no children.

C. A.
1927
BLACKWELL, *In re.* BLACKWELL *v.* BLACKWELL.
Eve J.

In this action the plaintiffs, the widow and son, claim a declaration that no valid trusts of the legacy of 12,000*l.* were ever declared by the testator in favour of the two last defendants, the lady and her son, or either of them, or in favour of any other person or persons, and that such legacy ought to be held on the trusts of the residue. The claim is based on the allegations of fact in para. 7 of the statement of claim, that no trusts of the legacy were ever indicated to the five named trustees, or any of them, in writing or verbally, prior to the death of the testator, and upon the argument that parol evidence is not admissible to establish "the purposes," or to identify "the person or persons" indicated by the testator, and that even if such evidence is admissible, the legacy is void for uncertainty, and for inconsistency.

It is true that apart from the codicil itself no trusts were indicated in writing to the trustees, or any of them, but the evidence of each and all makes it quite clear that they were respectively invited by the testator to become trustees of the legacy he was bequeathing to them for the benefit of the two last defendants.

None of the evidence which I have so far detailed has been seriously challenged, but, as I have already indicated in an earlier passage of this judgment, Mr. Cowley has deposed to instructions received from the testator on February 13 beyond those specifically mentioned in the codicil. The most important of these was, of course, the one disclosing the identity of the beneficiaries—their full names and the address where they were to be found. The others were to the effect that the trustees were to have a discretion as to distributing the whole income in each year, or accumulating thereout in the earlier years a fund for the education of the boy as he grew older, that no payment of capital is to be made to the boy before he attains twenty-one, that on failure of the trusts by the death of the mother and son before they have been fully executed, the trust fund, or so much of it as then exists, is to revert to the testator's estate, and that the trustees, in the event of the boy taking up a commercial career, might apply part of the capital in setting him up in business. In

connection with this last matter it is to be observed that the testator informed Mr. Barnett that he had selected him and some of the others as trustees because he felt that if the boy ultimately decided to adopt a commercial career they would be well qualified to help him therein.

Within a couple of hours after the execution of the codicil Mr. Cowley wrote the memorandum marked "W. P. C. 1." It is headed "In re Mr. J. D. Blackwell. "Memorandum of verbal instructions given to me at execution of codicil 13/2/25," and is in these terms: "Income of 12,000*l.* to be paid to," then there is the lady's name and full address, "or applied at discretion of trustees for the benefit of herself and her son," and his full name follows. "At any time trustees may pay over 8000*l.* of capital either to her or her son or both of them. In such event 4000*l.* is to go back to testator's trustees on same trusts as his residuary estate." That is signed by Mr. Cowley. This memorandum establishes the identity of the beneficiaries, and in my opinion embodies the instruction under which the trustees were to have a discretion as to the payment of the income of the settled fund to the lady, or apply it at their discretion "for the benefit of herself and her son"—words of wide import, which might well justify the trustees in so dealing with it as to ensure the more permanent benefit of the two beneficiaries. Nothing is said about there being no payment to the boy until he is twenty-one, or of the application of capital in setting him up in business or of the destination of the unapplied part of the trust fund on failure of the trusts, but these are all matters of secondary importance, not going to the validity of the trust if otherwise established. The boy could not give a receipt for payment of any capital while under age; the direction as to expending capital in setting him up in business is little, if anything, more than an indication of one circumstance in which the payment to him of the 8000*l.* or part of it might be made, and the declaration of the ultimate trust of the unexpended fund for the residuary legatees on failure of the particular trusts only leaves the matter where it would have been in the absence of such declaration. In my opinion

C. A. 1927 BLACKWELL, *In re.* BLACKWELL *v.* BLACKWELL. Eve J.

it is not necessary to pursue the matter beyond the codicil and this memorandum to find a complete, valid and consistent trust of this pecuniary legacy for the last two defendants, and the sole question that remains is whether the evidence by which that trust has been established is admissible to that end.

Before I express my opinion on that, it is incumbent that I should point out that the conclusion I have just stated renders superfluous any criticism on Mr. Cowley's admitted lapses of memory in relation to the testator, and a subsequent attempt to supplement the fourth codicil by a somewhat more elaborate disposition. If proof of the creation and nature of the trusts had depended to any material degree on Mr. Cowley's statements of August, 1925, and January, 1926, his entire forgetfulness on those and other important occasions of the very unusual events and documents of March, 1925, would have gone far to raise a doubt of the reliability of his memory upon matters almost contemporary and intimately connected with the events and documents, the happening and existence of which had entirely escaped his memory; but, fortunately for the beneficiaries, their position is, in my opinion, established without recourse being had to any evidence later than February 13. In justice to Mr. Cowley, I should add that the effective cross-examination to which he was subjected did not involve any reflection on his veracity, and that so far as his evidence as to the minor events of his visits to the testator in February and May, 1925, differs from that of the plaintiffs, I am satisfied that his is the more accurate.

The point of law is, in my opinion, concluded so far as this Court is concerned by the decision in *Fleetwood's* case. (1) Theretofore in cases where no trust was disclosed on the face of the will parol evidence had been held to be admissible to establish that there was in fact a trust, and to prevent the legatee against conscience retaining the property for his own benefit; in other words, to defeat a fraud on the part of the ostensible beneficiary, and to fix him as a trustee for the real

(1) 15 Ch. D. 594, 607.

object of the testator's bounty. It was argued in *Fleetwood's* case (1), as in this one, that this reasoning does not apply where fraud is not an ingredient, and that as the Wills Act requires all wills to be in writing, a will which on the face of it appoints a trustee but does not disclose the individuals for whom he is constituted a trustee, discloses a trust incomplete and indefinite, and cannot be made complete and definite by parol without disregarding and violating the Act; but Hall V.-C. did not accept this argument, and supports his conclusion that parol evidence is also admissible to prove the trust in those cases where an incomplete trust is disclosed in the will by the following extract from the judgment in *Riordan* v. *Banon* (2): "The same principle which led this Court, whether wisely or not, to hold that the Statute of Frauds and the Statute of Wills were not to be used as instruments of fraud, appears to me to apply to cases where the will shews that some trust was intended, as well as to those where this does not appear upon it. The testator, at least when his purpose is communicated to and accepted by the proposed legatee, makes the disposition to him on the faith of his carrying out his promise, and it would be a fraud in him to refuse to perform that promise. No doubt the fraud would be of a different kind if he could by means of it retain the benefit of the legacy for himself; but it appears that it would also be a fraud though the result would be to defeat the expressed intention for the benefit of the heir, next of kin or residuary donees." Hall V.-C.'s decision, which has not escaped some criticism, has survived for nearly fifty years. It was distinguished in *In re Hetley* (3), where the testamentary disposition was construed not as creating a trust, but as conferring a general power of appointment, but it has been followed in some reported, and I doubt not in many unreported, cases, and, as was the case in *In re Gardom* (4), I consider myself bound by it, and must accordingly decide that the evidence I have heard on this occasion is admissible, and has established a valid trust

(1) 15 Ch. D. 594, 607.
(2) (1876) Ir. R. 10 Eq. 469, 478.
(3) [1902] 2 Ch. 866.
(4) [1914] 1 Ch. 662.

C. A. 1928

BLACKWELL, *In re.* BLACKWELL *v.* BLACKWELL.

of the 12,000*l.* in accordance with the codicil and the memorandum of even date.

The plaintiffs must pay the costs of the action.

G. M.

The plaintiffs appealed. The appeal was heard on April 20 and 23, 1928.

Sir Thomas Hughes K.C. and *J. M. Easton* for the appellants repeated in substance the arguments used by them in the Court below, and in addition to the cases there cited referred to *In re Pitt Rivers* (1) and *In re Gardom* (2) in the House of Lords, reported sub nom. *Le Page* v. *Gardom.* (3)

Gavin Simonds K.C. and *John Bennett* for the seven first respondents and *Bennett K.C.* and *Raymond Jennings* for the two last respondents were not called upon to argue.

LORD HANWORTH M.R. This appeal has raised a very interesting point, but we have come to the conclusion that the order of Eve J. is right, and that his decision must be affirmed. The facts are completely and accurately stated by Eve J. in his judgment. I only repeat as few of them as are necessary to the understanding of this particular judgment.

The testator in the present case was a Mr. John Duncan Blackwell, called the elder, because he had a son of the same name, and it appears that in addition to two children which he had by his marriage, a son and a daughter, he had had relations with another lady, by whom he had had a natural son. As a matter of fact the daughter, who had married, died without children a few days before her father, the testator, on January 1, 1925, made a will, containing ordinary provisions for his wife and children. On January 15, 1925, he made a second codicil, whereby the shares of the son and daughter given to them by the will were settled and provision made that in the case of there being a necessary gift over, his property was to go to his brothers and sisters. Then in

(1) [1902] 1 Ch. 403.
(2) [1914] 1 Ch. 662.
(3) (1915) 84 L. J. (Ch.) 749; [1915] W. N. 216.

February there was another codicil, and on February 13 he saw his lawyer, who came from the Isle of Man, a Mr. Cowley, and a third codicil was executed by him, and finally a fourth codicil, on the same day. At that time, indeed, I think from the end of 1924, and certainly during the early months of 1925, the testator was suffering from severe illness, though his mind was unclouded and he was fully capable of making a testamentary disposition of his property.

The question that arises in this case is in reference to this fourth codicil which he made on this February 13, and to its terms I must refer a little later. On that day the testator had an interview before he executed this codicil with Mr. Cowley, and after he had executed it he still remained in this unfortunate condition of health, and finally died on June 3, 1925. Probate was granted on September 9, 1925, and this action was commenced by a writ dated October 18, 1926. It is a claim made by Mr. Blackwell's widow and his son against the persons who were named in the fourth codicil, to which I shall refer—his trustees and the two other persons, who would be, if that codicil is effective, beneficiaries under it.

The claim is for a declaration that no valid trusts were ever declared by the testator in favour of the two last defendants, or in favour of any other persons whomsoever, and that the sum which was to pass under that codicil ought to pass into the testator's residuary estate; secondly, if and so far as is necessary administration of the estate of the testator.

Eve J. at the hearing of the case on December 19 dismissed the action with costs, and it is from that dismissal that the plaintiffs appeal. The terms of the codicil in question were that there was given to certain named trustees a sum of 12,000*l.*, "Free of all duties upon trust to invest the same as they in their uncontrolled discretion shall think fit and apply the income and interest arising therefrom yearly and every year for the purposes indicated by me to them with full power at any time to pay over the capital sum of 8000*l.* to such person or persons indicated by me as they think fit and to pay the balance of 4000*l.* to my trustees as part of

C. A. 1928

BLACKWELL, *In re.* BLACKWELL *v.* BLACKWELL.

Lord Hanworth M.R.

my residuary estate and upon the same trusts as are declared in my will and previous codicils."

As to the evidence which was given before the learned judge in relation to the position of those persons so named as trustees: with regard to Mr. Barnett and Mr. Wettern, there is evidence which shows that at the time when the testator was ill Mr. Barnett and Mr. Wettern saw him in his sick chamber on February 4, 1925, and that he then told them of the two beneficiaries of this proposed trust, of the sum which was to be put into the trust, and he asked them if they would accept the trusteeship: he also mentioned to them other persons who would be trustees. Apparently these two gentlemen, according to their evidence, assented.

Now, with regard to the one whose name is interlineated in the codicil, Mr. Mark Oliver, his evidence is that he saw the testator during his illness, that the testator told him that he had decided to leave the two beneficiaries 12,000*l.*, and asked him to become a trustee, to which he agreed. That was during the illness, although it is not definitely stated upon what day in January or February it was. With regard to Mr. Harrison there is also his evidence that the testator told him that he intended making a trust for those two beneficiaries, and asked him to be one of the trustees at the time he was speaking of, that was some time earlier, and I think at a later date he said in reference to that, at a time when he was in his illness: "I have settled the 12,000*l.* in trust for these two beneficiaries." With regard to the last, Mr. Cowley, the evidence stands in this way. He was a lawyer, and he had come over to see Mr. Blackwell at his urgent request, and the testator told him definitely what he wanted done in order that he might fulfil what he felt was his duty towards these two beneficiaries, and he, Mr. Cowley, drew up this codicil, but Mr. Cowley did not leave the matter there. After he had had this discussion, he went to his hotel, and there wrote out a memorandum. This memorandum can only be put forward as a note made by Mr. Cowley so near to the actual time of the interview which he had with Mr. Blackwell that Mr. Cowley is entitled

to make use of it to refresh his memory as to what happened. It is entirely evidence by parol: it is in no sense a document which can be referred to as a written document. In that memorandum the sum of 12,000*l.* is again mentioned, and it is stated that the income of it is to be paid to the two beneficiaries who are therein named or applied at the discretion of the trustees for their benefit. There is also this provision, that the trustees at any time may pay over the 8000*l.* of capital, either to the one beneficiary or to the other or both of them, and if that is done, 4000*l.*—that is the balance of the 12,000*l.*—is to go back into the testator's residuary estate. If one takes the memorandum, or, may I say, the parol evidence which is derived from the memorandum, and adds that to the codicil, it is plain that a trust for the persons thus indicated is found: the figure was originally mentioned in the codicil: the income is referred to in the memorandum, and the same division of the 8000*l.* and the 4000*l.* is made in the memorandum as was made in the codicil. In that way the memorandum appears to supplement what was deficient in the codicil, and I agree with Eve J., who says in his judgment: "In my opinion it is not necessary to pursue the matter beyond the codicil and this memorandum to find a complete, valid and consistent trust of this pecuniary legacy for the last two defendants."

Now a serious question arises. By the terms of the Wills Act, s. 9, it is provided that "No will shall be valid unless it shall be in writing, and executed as in manner hereinafter mentioned." That provision replaces the old law under which, by the Statute of Frauds, it was provided by s. 19 that no nuncupative wills should be good, having to be, under the provisions set out in s. 19, reduced into writing, unless certain provisions were followed. That provision of the statute was repealed by s. 2 of the Wills Act.

We have, therefore, to consider very carefully whether or not, if it is necessary to supplement the codicil, it is possible to look at the memorandum for that purpose. It is plain that it can be said offhand that the codicil itself does not identify the two beneficiaries, and if so, and one looks at

C. A. 1928 BLACKWELL, *In re.* BLACKWELL *v.* BLACKWELL. Lord Hanworth M.R.

the parol evidence contained in the memorandum, one is supplementing the codicil, and that in spite of the terms of s. 9 of the Wills Act that no will shall be valid unless it shall be in writing. It is said, in confirmation of that argument, that it has been said in plain language in the House of Lords that there is a class of cases where you may supplement what has been provided by will, but that that class is a narrow and limited one. In *McCormick* v. *Grogan* (1) Lord Hatherley L.C. says that where secret instructions have been given to a person who is made a legatee under the will, and those instructions have been communicated to him by the testator, the Court will enforce those instructions and see that the legatee will abide by the instructions as communicated to him. That is in order to avoid a fraud, and he says (2): "But this doctrine evidently requires to be carefully restricted within proper limits. It is in itself a doctrine which involves a wide departure from the policy which induced the Legislature to pass the Statute of Frauds, and it is only in clear cases of fraud that this doctrine has been applied—cases in which the Court has been persuaded that there has been a fraudulent inducement held out on the part of the apparent beneficiary in order to lead the testator to confide to him the duty which he so undertook to perform." Lord Westbury says (3) it is in cases of fraud that the Court allows this parol evidence to be given: . . . . "then, undoubtedly, the heir-at-law in the one case, and the disponee in the other, will be converted into trustees, simply on the principle that an individual shall not be benefited by his own personal fraud." In other words, the Court will insist upon the legatee performing the terms and conditions under which alone he became the legatee. It is said that to look at the memorandum in the present case, or, as I prefer to put it, to allow the evidence of Mr. Cowley to be received, is to enlarge the principle so laid down by the House of Lords, and in particular because there is no fraud which is charged in the present case, or to

(1) L. R. 4 H. L. 82, 88. (2) L. R. 4 H. L. 89.
(3) L. R. 4 H. L. 97.

put it in the words of Eve J., that you cannot apply the principle of looking at parol evidence except where fraud is an ingredient.

There is, however, a case in which parol evidence was admitted without the suggestion of fraud. That is *In re Fleetwood* (1), which was decided by Hall V.-C. in May, 1880. Although he recognizes the importance of the element of fraud, he accepts the evidence which was there tendered to him, and, after going through all the cases, he adopts the summary of Chatterton V.-C. in *Riordan* v. *Banon* (2), and cites the following passage from his judgment: "The result of the cases appears to me to be that a testator cannot by his will reserve to himself the right of disposing subsequently of property by an instrument not executed as required by the statute, or by parol; but that when, at the time of making his will, he has formed the intention that a legacy thereby given shall be disposed of by the legatee in a particular manner, not thereby disclosed, but communicated to the legatee and assented to by him, at or before the making of the will, or probably, according to *Moss* v. *Cooper* (3), subsequently to the making of it, the Court will allow such trust to be proved by admission of the legatee, or other parol evidence, and will, if it be legal, give effect to it." The decision in *In re Fleetwood* (1), given in 1880, has stood down to the present time, for forty-eight years. It is said that it has been criticized in some cases. I am bound to say that the cases in which references to it were made and in which it has been distinguished do not to my mind assist the Court very much, because they seem to be of very limited effect.

In *In re Hetley* (4), which was decided in the interval between the decision given by Farwell J. in *In re Huxtable* (5) and that case going to the Court of Appeal, *In re Fleetwood* (1) was distinguished, but on the ground that what had been attempted by the testator was to create a power. *In re Hetley* (4) was a case in which there was a power given to

(1) 15 Ch. D. 594.
(2) Ir. R. 10 Eq. 469, 477.
(3) (1861) 1 J. & H. 352.
(4) [1902] 2 Ch. 866.
(5) [1902] 1 Ch. 214.

C. A. 1928

BLACKWELL, *In re.* BLACKWELL *v.* BLACKWELL.

Lord Hanworth M.R.

another person to decide on and to carry out what ought to have been carried out by the terms of the will itself, and Joyce J. rejected the evidence under which such a power would be created. In that I think he was right, but I do not think that that case casts a serious doubt upon the decision of *In re Fleetwood* (1), because *In re Hetley* (2) and *In re Fleetwood* (1) seem to me to be dealing with two very different questions.

There is also the case of *In re Gardom* (3), in which the question was again in a measure considered, but again I do not think that case is of serious relevance upon the present point. Eve J. followed *In re Fleetwood* (1), and this appeal is taken in order that the question of the validity of the decision in *In re Fleetwood* (1) may be brought before this Court. I am of opinion, however, that this Court is concluded in its decision by what was decided by this Court in *In re Huxtable.* (4)

I must refer at some little length to *In re Huxtable* (4), which came, first of all, before Farwell J. (5) In that case the testatrix by her will bequeathed 4000*l.* to a clergyman friend "for the charitable purposes agreed upon between us." The questions there raised were two—namely, was the charitable purpose a general one, or was it restricted in any way, and, next, was the 4000*l.* given absolutely for that charitable purpose, or was the gift confined to the income derived from it only. The clergyman gave evidence, in which he stated that the intention of the testatrix was that he should receive the income of the 4000*l.* during his life for the relief of sick and necessitous persons being members of the Church of England. The parol evidence left the legacy restricted in its purpose and scope, and also in its duration of time. Farwell J. considered the matter after it had been argued before him on behalf of the Attorney-General, and also on behalf of the residuary legatees, and held that he was bound to follow *In re Fleetwood* (1), and on the question, simpliciter,

(1) 15 Ch. D. 594.
(2) [1902] 2 Ch. 866.
(3) [1914] 1 Ch. 662.
(4) [1902] 2 Ch. 793.
(5) [1902] 1 Ch. 214.

of whether he would receive the parol evidence or not, he said (1): "If Mr. Parker had objected in form to my admitting the evidence, I should have overruled the objection, on the authority of that case" (*In re Fleetwood* (2)), and he then held that there was, after the parol evidence had been accepted, proof that there was a limited charitable intent—namely, the sick and necessitous persons, members of the Church of England, and he also accepted the parol evidence as to the bequest being of the income only. It is plain on looking at the decision of Farwell J. that he had carefully considered the decision of *In re Fleetwood* (2), and that he would in consequence have overruled any objection that could be taken to the admission of parol evidence in accordance with that decision, and he acts upon the parol evidence given (*a*) as to the scope and purpose of the bequest, and (*b*) as to the period of time during which it is to subsist. That decision went to this Court, and although Sir Thomas Hughes has argued with great force that the point he is now pressing was not concluded by the decision of the Court, I have come to a contrary opinion. It appears to me that Sir Robert Finlay, the then Attorney-General, in arguing the appeal had put the antithesis between a general charitable purpose and a limited charitable purpose. His argument was this (3): "It is submitted that the whole 4000*l.*—not merely a life interest in it—is given by the will for the charitable purposes mentioned in it and defined by the affidavit of the defendant Crawfurd." Then he goes on: "At any rate, the whole fund is given for charitable purposes generally." It appears to me that it is quite plain that the Attorney-General not only saw, but was arguing that the affidavit was admissible for the purpose of freeing him from any restriction on the charitable purposes intended, and also of freeing him from the limitation of the bequest to income only. When the decision of the Court is given, Vaughan Williams L.J. in terms says (4): "I cannot doubt that the affidavit of Mr. Crawfurd is admissible in evidence, but it is admissible

(1) [1902] 1 Ch. 214, 216.
(2) 15 Ch. D. 594.
(3) [1902] 2 Ch. 793, 794.
(4) Ibid. 795.

C. A.
1928
BLACKWELL, *In re.*
BLACKWELL *v.* BLACKWELL.
Lord Hanworth M.R.

only for the purpose of proving matters which are not defined by the will." Stirling L.J. says (1): "In my opinion, that affidavit is admissible only for the purpose of ascertaining what are the charitable purposes which are referred to in the will, and no further." Cozens-Hardy L.J. says (2) that "Mr. Crawfurd's affidavit may be referred to for one purpose only, namely, to ascertain what are the charitable purposes agreed upon." The reason why the Court came to the conclusion that the affidavit was admissible only on the one point and not on the other was that if it had been held to be admissible on the other, it would have purported to contradict the terms of the will under which there was an out and out gift of 4000*l.*, and not merely the income of it, for the charitable purposes agreed upon between them. Having looked at that case again this morning with the assistance of Sir Thomas Hughes, it appears to me quite plain that the Court must have had before it the decision of Farwell J., who had in terms said that he would have had some little doubt as to the admissibility of the evidence but for *In re Fleetwood* (3), which he had determined to follow; further, that it was held that when the evidence so tendered was considered, it was admissible on the one point, and not on the other. Thus the Court divided the evidence claimed to be admitted, and allowed a portion, and no more, to be admitted, rejecting the other part, which appeared to contradict the terms of the will. The result was that the purposes for which the bequest was made were limited in terms that were in accordance with the parol evidence given. Inasmuch as the bequest was perfectly good as to the amount, 4000*l.*, and perfectly good for charitable purposes generally, it appears to me that the Court must have determined to follow *In re Fleetwood* (3) in order to ascertain what were "the purposes agreed upon between us," for otherwise they could have upheld and maintained the legacy for charitable purposes generally, without looking at all at the affidavit; and it is evident that all the members

(1) [1902] 2 Ch. 797. (2) [1902] 2 Ch. 798.
(3) 15 Ch. D. 594.

of the Court of Appeal determined that they would look at it, and ultimately did determine that the charitable purpose was limited in accordance with the parol evidence.

I have sent across to the Record Office and have had brought to this Court the actual order which was made in the case, from which it appears that after the necessary recitals the declaration is made in this form: "This Court doth declare that as the legacy of 4000*l.*, both as to capital and income is well given for the charitable purposes referred to in such will, and mentioned in the affidavit of the said defendant Charles . . . . Crawfurd, filed on the 19th September, 1901, that is to say, primarily for the relief of sick or necessitous persons, being members of the Church of England, as also towards the support of charities connected with the Church of England." If attention were given to the actual evidence contained in the affidavit, it would be found that that order follows, I think, almost exactly the terms of the affidavit.

For these reasons I am of opinion that it is impossible for this Court, without neglecting its traditions and duty, to hold otherwise than that it is bound by *In re Huxtable.* (1) I am not unaware that a strong argument may be put before the House of Lords on the basis of the Wills Act and what was said in the speeches of the learned Lords in *McCormick* v. *Grogan.* (2) At the same time, I feel bound to express my opinion to this extent, that inasmuch as that decision of *In re Fleetwood* (3) has stood now for forty-eight years, it would appear to be a serious inroad upon practice and existing law if the case were upset and rejected. My colleagues, who speak with greater authority than I can in the present case, think that in many decisions given in Courts of first instance that case has been followed, and for my part I should be reluctant at this time to free myself from it, more particularly in a case like the present where, in considering the intentions of the testator, *In re Fleetwood* (3) seems to come to the assistance of the Court

(1) [1902] 2 Ch. 793. (2) L. R. 4 H. L. 82.
(3) 15 Ch. D. 594.

C. A. 1928

BLACKWELL, *In re.* BLACKWELL *v.* BLACKWELL.

and to enable it to pronounce in favour of what it is clear the testator intended to effect.

For these reasons the appeal must be dismissed with costs.

LAWRENCE L.J. I agree. The main contention of the appellants on this appeal is that *In re Fleetwood* (1) was wrongly decided and ought to be overruled, in so far as it purports to lay down the principle that where personalty is bequeathed to a person, and the testator declares that it is to be held upon trusts already communicated to the legatee, evidence is admissible to show what the trusts are, and that if it be proved that those trusts had been communicated to the legatee at or before the execution of the will, the Court will give effect to them, if they are valid.

In the present case Eve J. held that he was bound by the decision of *In re Fleetwood* (1), and consequently he admitted evidence to show what the trusts of the legacy of 12,000*l.* were. The appellants did not in this Court seriously dispute that the learned judge was right in the view he took on this point, but they contended that this Court was not bound by *In re Fleetwood* (1), and ought to overrule it on the ground that it conflicts with s. 9 of the Wills Act, which enacts that no will shall be valid unless it shall be in writing and executed in manner therein mentioned. This contention raises the crucial question whether the principle laid down by Hall V.-C. in *In re Fleetwood* (1) has received the approval of the Court of Appeal in *In re Huxtable* (2), and thus made that principle binding on this Court. In *In re Huxtable* (2) the testatrix bequeathed 4000*l.* to one Crawfurd "for charitable purposes agreed upon between us," and the executors of the will took out an originating summons to have it determined whether that legacy, or any part of it, was given to Mr. Crawfurd beneficially, or on any and what charitable or other trusts, or whether the legacy, or any part of it, had failed. The case came before Farwell J., and that learned judge held

(1) 15 Ch. D. 594. (2) [1902] 1 Ch. 214; [1902] 2 Ch. 793.

that on the face of the will there was a gift, not for general but for limited charitable purposes, and that on the authority of *In re Fleetwood* (1) evidence was admissible to show what those purposes were. The learned judge further held on the evidence that there was a good charitable bequest of the income of the fund during the life of Mr. Crawfurd, and that on his death the corpus would fall into residue, and also that the restriction of the gift to the income of the fund during Mr. Crawfurd's life did not contradict the terms of the bequest. As regards the decision in *In re Fleetwood* (1) the learned judge says (2): "I should have had some little doubt as to the admissibility of the evidence, if it had not been for the decision of Hall V.-C. in *In re Fleetwood.* (1) That is a decision more than twenty years old, and I certainly feel bound to follow it. If Mr. Parker had objected in form to my admitting the evidence, I should have overruled the objection on the authority of that case." Again, on the following page he says (3): "It seems to me I must admit the evidence on the authority of *In re Fleetwood* (1) to show what the parties agreed upon. That being so, the scheme will be limited to dealing with the income of the fund during the lifetime of Mr. Crawfurd. But the purposes agreed upon seem to be sufficiently good purposes; and if the Attorney-General is satisfied, there need not be a scheme." The Attorney-General appealed from that decision, and the Court of Appeal held, affirming the decision of Farwell J., that the gift was a valid gift for limited charitable purposes, and admitted and acted upon evidence to show what those purposes were. The Court of Appeal, however, held, reversing the decision of the learned judge on this point, that as the gift on the face of the will was a gift of the whole capital sum of 4000*l.*, no evidence was admissible to show that the agreement between the testatrix and Mr. Crawfurd was that only the income of the fund during his life should be devoted to the special charitable purposes, as such evidence would contradict the terms of the will.

(1) 15 Ch. D. 594. (2) [1902] 1 Ch. 214, 216.
(3) [1902] 1 Ch. 217.

C. A.
1928
BLACKWELL, *In re.* BLACKWELL *v.* BLACKWELL.
Lawrence L.J.

On the question of the admissibility of the evidence in that case Vaughan Williams L.J. says (1): "I cannot doubt that the affidavit of Mr. Crawfurd is admissible in evidence, but it is admissible only for the purpose of proving matters which are not defined by the will. Evidence is admissible to show what were in fact the charitable purposes agreed upon between the testatrix and Mr. Crawfurd, but not to show what was the amount of the legacy. That is a matter which, to my mind, is disposed of by the plain words of the will." Then, after referring to the particular charitable purposes disclosed in the affidavit, the learned Lord Justice winds up by saying: "To that extent the affidavit is admissible and does define the purposes." Stirling L.J. says (2): "Mr. Crawfurd has made an affidavit (to the admission of which I understand the Attorney-General makes no objection) in which he says that conversations took place between the testatrix and himself with reference to a legacy of 4000*l.* which she said she was going to leave him, and that he was to apply the income of that 4000*l.* during his own life for certain charitable purposes which he specifies, and at his death he was to be at liberty to dispose of it as his own property. In my opinion, that affidavit is admissible only for the purpose of ascertaining what are the charitable purposes which are referred to in the will, and no further." Cozens-Hardy L.J. says (3): "It seems to me that the will fixes absolutely the subject-matter of the gift, namely, 4000*l.*, and that Mr. Crawfurd's affidavit may be referred to for one purpose only, namely, to ascertain what are the charitable purposes agreed upon." In the result the Court of Appeal made a declaration that the corpus and income of the fund were held upon the particular charitable trusts mentioned in Mr. Crawfurd's affidavit.

In my judgment this decision of the Court of Appeal is a direct affirmation of the principle laid down in *In re Fleetwood* (4), and none the less so because that case was not in terms mentioned in the judgments delivered by the members

(1) [1902] 2 Ch. 793, 795.
(2) Ibid. 797.
(3) [1902] 2 Ch. 798.
(4) 15 Ch. D. 594.

of the Court. The judgment of Farwell J., which was founded on the admissibility of the evidence because of the decision of *In re Fleetwood* (1) was before the Court of Appeal, and the Court of Appeal in express terms decided that so much of the evidence as did not contradict the terms of the will was admissible, and made a declaration based on such evidence.

Sir Thomas Hughes, on behalf of the appellants, however, strenuously contended that this Court is not bound by the decision of *In re Huxtable* (2), because in that case the Attorney-General did not object to the admission of Mr. Crawfurd's affidavit, and that the order made by the Court of Appeal on this point was in substance an order made by consent. In my judgment that contention is not well founded. As appears from the passages from the judgments which I have quoted, Farwell J. stated that if the Attorney-General had formally objected to the admission of the evidence, he, the learned judge, would have overruled that objection, on the authority of *In re Fleetwood* (1), and in the Court of Appeal the evidence was not only read but was carefully scrutinized in order to see how far it was admissible, and so much of it as the Court held to be contradictory to the will was rejected, whilst the rest of it was held in express terms to be admissible and formed the foundation of the declaration which the Court made in that case. The final sentence in the judgment delivered by Cozens-Hardy L.J. in *In re Huxtable* (3)—namely "I do not know whether the Attorney-General would object to a declaration that the 4000*l.* is held upon the charitable trusts mentioned in paragraph 3 of the affidavit"—is, in my opinion, merely directed to the form of the declaration, and not to the substance of it. The Court is not in the habit of making a declaration by consent.

It was, however, further contended that this Court was not bound to follow *In re Huxtable* (2), because since that case was decided doubts have been expressed both in the House

(1) 15 Ch. D. 594. (2) [1902] 2 Ch. 793.
(3) [1902] 2 Ch. 793, 798.

C. A. 1928 BLACKWELL, *In re.* BLACKWELL *v.* BLACKWELL. Lawrence L.J.

of Lords and in the Court of Appeal, as to the soundness of the decision in *In re Fleetwood.* (1) In support of this contention, Sir Thomas Hughes has referred us to *Le Page* v. *Gardom* (2) and to *In re Gardner.* (3) In the former case Lord Dunedin said that if it ever became necessary to decide it, he thought it would have to be carefully considered whether *In re Fleetwood* (1), on the assumption that it was rightly decided, could be held to rule a case where the bequest was to a trustee and executor ; and Lord Parker said whether or not *In re Fleetwood* (1) be good law, as to which he desired to reserve his opinion, he did not think that the appellants there had proved sufficient to bring themselves within the principle of that case as laid down by Hall V.-C. Although those dicta show that these two learned Law Lords guarded themselves from being supposed, merely because evidence in that case had been received and had been considered, to have expressed approval of the principle of *In re Fleetwood* (1), yet they fall far short of expressing any disapproval of that principle, and in my judgment do not afford sufficient ground upon which this Court could take upon itself to review the decision of *In re Huxtable.* (4) In *In re Gardner* (3) Warrington L.J., in commenting on *Johnson* v. *Ball* (5) and *In re Gardom* (6) said (7) : " In such cases as that "—that is to say, in cases in which the legatee did not take under the terms of the will for his own benefit—" the trusts upon which the trustee is to hold the property must be contained in the will itself, or in some document in existence at the date of the will, or it may be, if *In re Fleetwood* (1) was properly decided, declared by parol and accepted by the trustee at or before the execution of the will." It is to be observed that *In re Huxtable* (4) was not cited, nor was the correctness of the decision of *In re Fleetwood* (1) challenged by counsel on either side. In the circumstances, the expression of doubt as to the correctness of the decision by

(1) 15 Ch. D. 594.
(2) 84 L. J. (Ch.) 749.
(3) [1920] 2 Ch. 523.
(4) [1902] 2 Ch. 793.
(5) 5 De G. & Sm. 85.
(6) [1914] 1 Ch. 662.
(7) [1920] 2 Ch. 523, 532.

the learned Lord Justice does not in my opinion afford any ground for holding that the principle of *In re Fleetwood* (1) is not binding on this Court after the decision of *In re Huxtable.* (2)

The only other case cited to us which was alleged to have any bearing on the point now under consideration was *In re Hetley.* (3) In that case, which was decided by Joyce J. before *In re Huxtable* (2) had come before the Court of Appeal, a testator by his will appointed his wife sole executrix, and gave her his property for life. He then desired and empowered her by her will or in her lifetime to dispose of his estate "in accordance with my wishes verbally expressed by me to her." The learned judge distinguished that case from *In re Fleetwood* (1) on the ground that it was an attempt to create a power and was not a case of a definite trust for particular individuals being attached to a gift to a named legatee, and goes on to say (4): "If I held this power to be valid, I should be going beyond *In re Fleetwood* (1), and, in spite of the Wills Act, should be introducing what Kay J. calls a serious innovation upon the law relating to testamentary instruments." This case seems to me to have no bearing on the question whether the decision of the Court in *In re Huxtable* (2) is binding upon this Court.

In the result I have come to the conclusion that none of the cases decided subsequently to *In re Huxtable* (2) in any way shakes the authority of that case, and that it is binding on this Court. Having arrived at that conclusion, there is no occasion to express my own opinion upon the soundness of the decision in *In re Fleetwood* (1), or upon the question whether in any event it would be right to disturb that decision in view of the time which has elapsed since it was decided.

There remain only two further questions to be considered. The first of these turns upon the construction of the fourth codicil. The appellants contended that the expression "for the purposes indicated by me to them" necessarily included purposes indicated by the testator subsequently to the date

(1) 15 Ch. D. 594.
(2) [1902] 2 Ch. 793.
(3) [1902] 2 Ch. 866.
(4) Ibid. 866, 870.

C. A. 1928

BLACKWELL, *In re.* BLACKWELL *v.* BLACKWELL.

Lawrence L.J.

of the codicil, and therefore the gift was void. In my opinion the construction thus sought to be placed upon the expression in question is not the true construction. The use of the definite article and of the past participle without any words of futurity seems to me to negative the construction contended for by the appellants. There is nothing in the context which requires that the expression should be construed otherwise than in accordance with its primary and grammatica meaning, and in my opinion the appellants' contention on this point fails.

The only other question is whether the evidence adduced in this case is sufficiently clear and definite to establish the trusts upon which the 12,000*l.* legacy is to be held, or whether it leaves those trusts so vague as to compel the Court to hold that they are void for uncertainty. Upon this question I find myself in complete agreement with Eve J. and the Master of the Rolls. In my judgment the trusts recorded in the memorandum made by Mr. Cowley as those which were indicated to him by the testator prior to his execution of the fourth codicil are sufficiently clear and definite to enable the Court to decree their execution. These trusts do not in any way conflict with the terms of the codicil, and read into it there is formed an effective trust which, as matters now stand, clearly operates in favour of the lady and her son. It would be inexpedient at the present time to prejudge any question of construction which might hereafter arise upon the trusts as established in case certain events should happen. So long as the lady is alive, it seems to me that there is no difficulty in administering the trusts in strict accordance with the terms as recorded in the memorandum, and that it is better to leave the matter there. The action was brought to have it declared that there were no effective trusts of the legacy. That action, in my judgment, fails, and was rightly dismissed by the learned judge. I agree, therefore, that this appeal ought to be dismissed with costs.

RUSSELL L.J. I am of the same opinion, and I desire only to add a very few words upon two points. The first

is whether or not the Court of Appeal did in *In re Huxtable* (1) adopt the principle adopted in *In re Fleetwood.* (2) In my opinion it did. I have read with some care the judgment and the arguments in that case, and I should like to state in my own language what I understand to be the respective contentions addressed to the Court of Appeal in *In re Huxtable* (1) and what I understand to be the decision of the Court of Appeal in that case. The Crown put forward a twofold alternative argument. The Crown said that if the parol evidence were admissible, nevertheless the whole corpus and income of the fund were applicable to the defined charitable purposes; and alternatively to that, they argued that if the evidence was not admissible, yet the whole corpus and income of the fund in question was applicable for general charitable purposes. On the other hand, the next of kin or residuary legatees argued that the evidence was admissible both for the purpose of defining the charitable objects and for the purpose of limiting the duration of the trusts. What the Court of Appeal decided as between those respective contentions was that the parol evidence was admissible for the purpose of defining the charitable objects, but was inadmissible for the purpose of limiting the duration of the trusts, and it was inadmissible for that purpose, because if admitted it would be contradictory of the provisions of the will. It is true that according to the report in the Law Reports, *In re Fleetwood* (2) does not appear as having been in terms cited to the Court. But they must have considered it, because it was the foundation of Farwell J.'s judgment, which was under appeal. In my opinion, having carefully considered *In re Huxtable* (1), I am quite satisfied that the Court of Appeal in that case deliberately adopted the principle which appears in *In re Fleetwood.* (2)

The second point, as to which I wish to add one or two observations, is Mr. Easton's contention that in the present case upon the evidence the trusts were not clearly defined, for this reason, that Mr. Cowley in his verbal evidence stated definitely

(1) [1902] 2 Ch. 793. (2) 15 Ch. D, 594.

C. A. 1928 BLACKWELL, *In re.* BLACKWELL *v.* BLACKWELL. Russell L.J.

that the memorandum which he had drawn up was not an exhaustive document. Accordingly, it was contended by Mr. Easton that in those circumstances the full trusts had not been proved, because the learned judge in the Court below had stated that except in so far as Mr. Cowley's evidence was supported by the memorandum, his memory was not reliable. I have looked at the learned judge's judgment upon this point, and it would appear that apart from and outside the memorandum there were three other points which had been mentioned by the testator, and the learned judge deals with those points in his judgment in the following terms. He says: "This memorandum establishes the identity of the beneficiaries, and in my opinion embodies the instruction under which the trustees were to have a discretion as to the payment of the income of the settled fund to the lady, or apply it at their discretion 'for the benefit of herself and her son'—words of wide import, which might well justify the trustees in so dealing with it as to ensure the more permanent benefit of the two beneficiaries." Then he mentions the three points: "Nothing is said about there being no payment to the boy until he is twenty-one, or of the application of capital in setting him up in business or of the destination of the unapplied part of the trust fund on failure of the trusts, but these are all matters of secondary importance, not going to the validity of the trust if otherwise established. The boy could not give a receipt for payment of any capital while under age; the direction as to expending capital in setting him up in business is little, if anything, more than an indication of one circumstance in which the payment to him of the 8000*l.* or part of it might be made, and the declaration of the ultimate trust of the unexpended fund for the residuary legatees on failure of the particular trusts only leaves the matter where it would have been in the absence of such declaration." From that it would appear that those points are really matters of quite subsidiary importance, which are in terms actually covered by the document which has been referred to as the memorandum.

In all other respects I agree with the judgments which

have already been pronounced, and with the result that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Rooke & Sons, for T. & G. S. Brownson, Manchester; Simmons & Simmons, for March, Pearson, Yates & Green, Manchester, and for Graham-Hooper & Betteridge, Brighton.*

W. I. C.

WAY *v.* BISHOP.

[1928. W. 666.]

Partnership—Articles—Construction—Covenant not to practise as a Solicitor within limited Area—Acting as Managing Clerk to Solicitor at a fixed Salary within prohibited Area—Whether Breach of Covenant.

By articles of partnership dated February 1, 1924, the plaintiff and defendant mutually covenanted (inter alia) (clause 1) that they would carry on together the business of solicitors at Portsmouth; (clause 2) that the partnership should continue until its determination as thereinafter provided; (clause 19) that it should be lawful for either of the partners to retire from the partnership on June 30 or December 31 in any year on giving not less than six calendar months' previous notice in writing to the other partner, and that the partnership should determine accordingly on the expiry of such notice; (clause 22) that on determination of the partnership by notice as aforesaid the plaintiff should have the option of continuing the business at the business premises in his own name, and (providing the notice if given by him was based on reasonable grounds) upon payment of the sums therein mentioned the defendant would enter into a covenant "not to practise in the Borough of Portsmouth or within five miles thereof for a period of ten years from the date of the determination of the partnership." In February, 1927 the plaintiff gave the defendant a notice in writing under clause 19 of his intention to retire from the partnership on December 31, 1927. On the determination of the partnership the defendant entered the service of one W., a solicitor practising in Portsmouth, as his managing clerk at a fixed salary. In an action by the plaintiff for an injunction to restrain the defendant from practising in Portsmouth contrary to the terms of clause 22 of the articles, and from entering into or remaining in the employment of W.:—

Held, that the covenant must be confined strictly to the practice as a solicitor, and that by merely acting as a managing clerk to another solicitor the defendant, although himself a solicitor, and although in a position to practise as such, was not in fact himself practising as a solicitor within the meaning of the covenant; that the test in every case must be whether in the work that the managing clerk was doing the relation of solicitor and client was constituted between him and the

C. A.
1928
WAY
v.
BISHOP.

person for whom he was acting; and that applying that test to the present case the evidence showed that the defendant had not hitherto practised as a solicitor, and there was no evidence that he threatened or intended so to practise in the future.

Palmer v. *Mallet* (1887) 36 Ch. D. 411 and *Robertson* v. *Willmott* (1909) 25 Times L. R. 681; [1909] W. N. 155 distinguished.

Decision of Clauson J. reversed.

APPEAL from a decision of Clauson J.

By an indenture dated February 1, 1924, and made between the plaintiff Leslie Bolitho Way (thereinafter called "the first partner") of the one part and the defendant Frederick Edward Bishop (thereinafter called "the second partner") of the other part the partners mutually covenanted and agreed (inter alia) as follows:—

Clause 1. "The said partners will carry on in partnership at Portsmouth aforesaid and at such other places as may be hereafter determined as from the 1st day of January 1924 the business of solicitors under the style of 'Bolitho Way & Bishop' in continuation of the like business carried on by the first partner under the style of 'L. Bolitho Way.'"

Clause 2. "The partnership shall continue until its determination in the manner hereinafter provided."

Clause 19. "It shall be lawful for either of the said partners to retire from the partnership on the 30th day of June or the 31st day of December in any year giving not less than six calendar months previous notice in writing to the other partner and the partnership shall determine accordingly on the expiry of such notice."

Clause 22. "On determination of the partnership by notice as aforesaid the first partner shall have the option of continuing the business at the business premises in his own name (and providing the notice if given by the first partner is based on reasonable grounds) and upon payment of the sums following namely the value of the office furniture then belonging jointly to the partners and the sum of 50*l*. at the end of one year 100*l*. at the end of two years and 50*l*. for each additional year of the partnership but not exceeding in the whole three years' purchase of one-half of the business the second partner will enter into a covenant not to practise in the Borough of

Portsmouth or within five miles thereof for a period of ten years from the date of the determination of the partnership. No other sum shall be payable in respect of goodwill."

Clause 23 provided for the reference to arbitration of all disputes arising between the partners.

On February 24, 1927, the plaintiff gave a notice in writing under clause 19 to the defendant Bishop of his intention to retire from the partnership on December 31, 1927. Whereupon a dispute arose between the partners whether the notice was based on reasonable grounds within clause 22 of the partnership articles, and the matter was accordingly referred to the arbitration of two umpires appointed under clause 23 thereof.

On January 9, 1928, the arbitrators made their award in the form of a special case in which they set out their findings and submitted to the Court the question whether upon the facts so found by them the notice given was based on reasonable grounds within the meaning of clause 22.

The case was heard before Clauson J. on February 16, 1928, who held that the notice given by the plaintiff to determine the partnership was based on reasonable grounds within clause 22 and that the partnership was determined as from December 31, 1927.

There was in Portsmouth another firm of solicitors whose business was until September, 1927, conducted by the father of the second defendant Henry Harman Wadeson, who had a practice as a solicitor at certain places in the county of Gloucester. In 1927 the defendant Wadeson had in effect to take over his father's business, and towards the end of that year, when his father died, he proceeded to carry on that business at Portsmouth within less than a mile from the plaintiff's business offices.

In January, 1928, the defendant Bishop entered the service of the defendant Wadeson at the Portsmouth office as a managing clerk.

On March 2, 1928, the plaintiff issued his writ in the present action against the defendants Bishop and Wadeson for an injunction to restrain the defendant Bishop from practising

C. A. 1928 WAY v. BISHOP.

in Portsmouth or within five miles thereof for a period of ten years from December 31, 1927, contrary to the terms of clause 22 of the articles of partnership and from entering into or remaining in the employment of the defendant Wadeson, and to restrain the defendant Wadeson from employing the defendant Bishop in his business in Portsmouth and so enabling the defendant Bishop to practise contrary to the provisions of clause 22 of the articles of partnership.

On March 20, 1928, the plaintiff moved for an interlocutory injunction in the terms of the writ. Clauson J., before whom the motion was heard, in the course of his judgment said that the question was whether, within the fair meaning of the covenant which had been entered into between the plaintiff Way and the defendant Bishop, both being solicitors in partnership, Bishop, in acting as managing clerk of the defendant Wadeson practising as a solicitor in the circumstances stated, could properly be described as "practising" in the borough of Portsmouth. In construing such a covenant as the one in question assistance was gained from the views expressed by the Court of Appeal in *Palmer* v. *Mallet.* (1) Having regard to the consideration that the covenant was entered into for the protection of the continuing partner against the outgoing partner, the covenant ought not, at that stage of the proceedings at all events, to be construed so narrowly as to confine its operation to the performance of functions which must result in the relation of solicitor and client existing between the defendant Bishop and the lay person for whom he acted. A wider construction must be given to the covenant; and on the facts before him, the learned judge came to the conclusion that what the defendant Bishop was doing, with the full knowledge and approval of the defendant Wadeson, amounted to a breach of the covenant, and he therefore granted an injunction in the terms of the notice of motion.

The defendant Bishop appealed from both orders of Clauson J., and the two appeals were by the direction of the Court put into the paper to be heard together.

(1) 36 Ch. D. 411.

On May 7, 1928, the appeal against the final order was first heard, and the Court of Appeal held upon the facts that the notice given by the plaintiff Way was based on reasonable grounds within the meaning of clause 22 of the articles and that the partnership had duly determined. They accordingly dismissed the appeal.

On May 8, 1928, the appeal against the order granting the interlocutory injunction in the present case was then proceeded with.

Archer K.C. and *Wynn Parry* for the appellant. It is submitted that the appellant in doing the work he is doing is not "practising" as a solicitor within the meaning of clause 22 of the articles. For the work he is doing there is no need for him to take out a certificate to practise. He will not have to appear in Court to conduct cases and by no possibility can he obtain any remuneration beyond his salary as a managing clerk. In *Reg.* v. *Judge of County Court of Oxfordshire* (1) Collins J. said: "I think a solicitor cannot be said to be a solicitor acting generally in the action or matter for a party unless the relation of solicitor and client exist between him and such party. It may well be that when a firm is retained each member of the firm may be described as a solicitor acting generally in the action for the party who retains him; but I think the same could not be said of a managing clerk who was not retained." Those observations apply to the present case.

Palmer v. *Mallet* (2), which was relied upon for the respondent, was a very different kind of case from the present. The words of the covenant in that case were much wider than those in this case. They were: "shall not at any time hereafter directly or indirectly either alone or in partnership with or as assistant to any other person carry on the profession or business of a surgeon." It is submitted that the covenant ought to be so limited as not to prevent the appellant doing all such work as an unadmitted solicitor may do, and ought not to be so construed as to debar him of his right of obtaining his livelihood.

(1) [1894] 2 Q. B. 440, 446. (2) 36 Ch. D. 411.

C. A. 1928 WAY v. BISHOP.

Van den Berg (*Gavin Simonds K.C.* with him) for the respondent. Before going into the cases it is necessary to see what were the facts on which the judge in the Court below relied. The business was the business of the respondent which he had purchased. The appellant had been a clerk in the office of the respondent, by whom he had been given his articles and by whom he was subsequently taken into partnership. It was therefore necessary that the respondent should stipulate in the articles for some measure of protection of his business in the event of a dissolution.

[LAWRENCE L.J. The respondent has not stipulated that the appellant shall not act as a managing clerk to another solicitor.]

It is submitted that the appellant in performing the work he does is practising as a solicitor within the meaning of clause 22, notwithstanding that he could not appear in a county court. He is doing all the work that a solicitor could do.

In *Robertson* v. *Willmott* (1) the defendant covenanted not to practise as an architect or surveyor within a defined area for a certain number of years, and Warrington J., following *Palmer* v. *Mallet* (2), held that he committed a breach of that covenant by acting as manager at a fixed salary to another architect. That decision, it is submitted, applies to the present case.

[RUSSELL L.J. Your argument must involve this, that every person who acts for a solicitor is practising as a solicitor, and further that every managing clerk to a solicitor must take out a certificate.]

A person can practise as a solicitor without bringing about the relation of solicitor and client between himself and the person for whom he acts.

If the Court puts upon the word "practise" in clause 22 a lower interpretation than that put upon it by Warrington J. in *Robertson* v. *Willmott* (1) it is difficult to see what protection the clause gives the respondent.

Archer K.C. was not called upon to reply.

(1) 52 Times L. R. 681; [1909] W. N. 155. (2) 36 Ch. D. 411.

LORD HANWORTH M.R. This appeal raises an important point in regard to the relations between solicitors and their clerks, and we have had the advantage of having the matter fully argued.

The facts of the case that we have to determine are these. There was a partnership constituted between Mr. Way and Mr. Bishop, and that partnership was brought to an end on December 31, 1927, by reason of a notice which was given in accordance with clause 19 of the partnership articles by Mr. Way to Mr. Bishop. We have already decided, affirming the order made by Clauson J. in a special case stated by arbitrators, that Mr. Way in giving that notice acted on reasonable grounds within the meaning of that phrase in clause 22 of the articles of partnership. The result is that the partnership between Mr. Way and Mr. Bishop was duly and properly determined as from December 31, 1927.

But now a new point arises in the present action which was commenced by writ on March 2 in this year. Under clause 22 of the partnership articles upon the determination of the partnership Mr. Way is entitled to require Mr. Bishop to enter into a covenant "not to practise in the Borough of Portsmouth or within five miles thereof for a period of ten years from the date of the termination of the partnership." Mr. Bishop secured employment as from January 30 last with a Mr. Wadeson. Mr. Wadeson has a business which was originally carried on by his father and which is now carried on by him partly at Gloucester and partly at Portsmouth. Mr. Wadeson's firm had acted for Mr. Bishop in the matter of the arbitration, and in that way Mr. Wadeson and Mr. Bishop came in touch with one another. Upon the death of his father Mr. Wadeson had to reconstitute the firm and provide for the business being carried on at two offices. He added to the staff of the Portsmouth office by employing Mr. Bishop as a clerk, and Mr. Bishop has from January 30, 1928, acted as such clerk. Mr. Way complained that Mr. Bishop by taking service in the firm of Wadesons, whose office in Portsmouth is about half a mile from his own office—800 yards to be precise—had committed

C. A. 1928 WAY v. BISHOP. Lord Hanworth M.R.

a breach of his covenant "not to practise in the Borough of Portsmouth or within five miles thereof for the period of ten years from the date of the termination of the partnership." Clauson J. has held that Mr. Bishop's conduct has been in breach of that covenant and he has granted an interim injunction against him. We have now to determine whether or not he was right in granting that injunction. It is an interim injunction, but in effect I think it will be the conclusion of the whole case.

I have come to the conclusion that I must disagree with Clauson J. The terms of the covenant are those which I have read. It is to be observed that the covenant is found in an indenture made between these two partners, Mr. Way and Mr. Bishop, which by clause 1 provides that: "The said partners will carry on in partnership at Portsmouth aforesaid and at such other places as may be hereafter determined . . . . the business of solicitors under the style of Bolitho Way & Bishop." Then by clause 22, upon the determination of the partnership certain payments are to be made "not exceeding in the whole three years' purchase of one-half of the business," and in an earlier part of the clause it is stated that on the determination of the partnership the first partner is to have the option of continuing the business. Thus it is made plain by the use of that term in the same sense, I think, as in clause 1, that what is referred to is the business of solicitors. Then the second partner, Mr. Bishop, is "not to practise in the Borough of Portsmouth or within five miles thereof." Mr. Van den Berg has said with force that if you take the whole of the partnership articles together you ought to read that word "practise" not in a narrow sense, but in a broad sense, taking note of the fact that the covenant was entered into for the purpose of preserving to Mr. Way the business which was his own business, and into which he admitted his clerk, Mr. Bishop, after long service, to be a partner. I do not think that we can take note of the reasons which induced Mr. Way to take Mr. Bishop into partnership; it must be assumed that it was to the advantage

of the business as a whole and by mutual agreement between the parties. We have only to construe this covenant, according to its true meaning as we find it in clause 22. It is obvious that the words used in this restrictive covenant are few, and we do not find in it any other words such as "either directly or indirectly being engaged in the business of a solicitor or as a managing clerk" or other words such as are not uncommon in similar documents. All that we have here is that Mr. Bishop is to enter into a covenant not to practise. I cannot fail to note that the parties have used there a word which is significant in the profession of a solicitor. As was pointed out by Russell L.J., there are provisions in the Stamp Act, 1891, which provide for penalties being imposed upon persons who practise as solicitors without a certificate. "Every person who, in any part of the United Kingdom"—so runs s. 43, sub-s. 1—"(*a*) Directly or indirectly acts or practises as a solicitor," and so on. Then we have the Solicitors Act, 1843, under which the distinction is made between qualified and unqualified persons, and the right to practise as a solicitor is one which is restricted to those who having qualified after passing their full examination and having been admitted by an admission certificate which is always signed by the Master of the Rolls have fulfilled the condition that is imposed upon them of taking out a certificate year by year in order to entitle them to practise.

It is said that Mr. Bishop will do much harm to the business of Mr. Way if he is to be found in Portsmouth, and that his association with another firm will attract business to that firm to the disadvantage of Mr. Way. All these were matters for consideration between the parties when they came to their agreement. They are very obvious matters, and if Mr. Way was minded to safeguard himself in the manner in which Mr. Van den Berg asks us to construe the agreement I think he ought to have done so in plain terms. I think the argument of Mr. Van den Berg is really that we ought to re-write the agreement made between the parties and embrace within the single word "practise" a number of operations which are not necessarily included within it.

C. A. 1928 WAY v. BISHOP. Lord Hanworth M.R.

Our attention has been called to *Palmer* v. *Mallet* (1), which seems to me not germane to the present case. There were words there which had to be construed which do not obtain in the present covenant. With regard to *Robertson* v. *Willmott* (2), the case which was decided before Warrington J. upon the authority of *Palmer* v. *Mallet* (1), it would appear to be an application of the doctrine of *Palmer* v. *Mallet* (1) which possibly might not have been reached if it had been argued at greater length. It was an interlocutory injunction as it stood, but I cannot myself accept that as an authority which would in any way restrict the interpretation which we ought to place upon these words.

If it is necessary for Mr. Bishop to resign his position at Wadesons' it would, I think, involve, as has already been pointed out by Russell L.J., the view that every managing clerk to a solicitor ought to be qualified and to take out a certificate, because he would be practising as a solicitor, and if he practises as a solicitor s. 43 of the Stamp Act would apply to him. It does not appear to me that that difficulty need arise in the present case. I think that there is quite a full appreciation of the difference between practising as a solicitor and acting as a clerk to a solicitor. I do not think that what Mr. Bishop is doing falls within the restriction which is placed upon practising solicitors as to their taking out certificates and the like, and I do not think that the covenant is wide enough to justify the restriction being placed upon the conduct of Mr. Bishop.

For these reasons I find it necessary to disagree with the judgment, and the appeal must be allowed with costs.

LAWRENCE L.J. I agree. The point which arises on this appeal is as to the meaning of the single word "practise" in clause 22 of the articles of partnership. The business of the partnership regulated by the articles is that of solicitors, it is plain therefore that the word "practise" denotes "practise as a solicitor." Clauson J. has held that this expression is wide enough to include acting in the capacity

(1) 36 Ch. D. 411. (2) 25 Times L. R. 681; [1909] W. N. 155.

of a managing clerk in the employ of another solicitor at a fixed salary. With the greatest respect for the conclusion so arrived at by the learned judge, I am unable to agree with it. The profession of a solicitor is different from that of any other profession in that a solicitor after admission cannot practise as a solicitor without taking out a stamped certificate authorizing him to practise as such, and, as appears from s. 22 of the Solicitors Act, 1843, such a stamped certificate can only be granted on the production of the registrar's certificate mentioned in s. 21, certifying that such person is an attorney or solicitor and entitled to take out such a stamped certificate. It appears from these provisions that the term "practise as a solicitor" bears a somewhat technical and limited meaning which is well known to solicitors but which does not include the doing of such legal work as can properly be done without taking out a certificate, even although the person doing such work happens to be a solicitor and qualified to take out such a certificate and may have in fact taken out such a certificate. The articles, having been entered into between two practising solicitors, must I think be construed as giving to the word "practise" that limited meaning to which I have referred, a meaning which the parties must be presumed to have had in mind. It is not for the Court to extend the meaning of the language used by the parties to express their contract, especially when dealing with a covenant in restraint of exercising a profession. The contracting parties have not thought fit to enlarge the scope of the covenant (as is not infrequently done in similar cases) by prohibiting the covenantor from acting as a clerk or assistant to another solicitor, and it is not the function of the Court to so enlarge it solely on the ground that the covenant as it stands does not afford that full protection to the covenantee which he would like to have. It is quite true that the omission of a prohibition against acting as a managing clerk to a solicitor within the prohibited area to a great extent lessens the value of the restrictive covenant in clause 22. No doubt the object of that covenant was to protect the goodwill of the business which the defendant

C. A. 1928 WAY v. BISHOP. Lawrence L.J.

was leaving in the hands of the plaintiff, and it may very well be that had the plaintiff realized that the defendant could lessen the value of the goodwill by acting as a managing clerk to another solicitor in Portsmouth the plaintiff would have sought to extend the covenant in the direction in which he now asks the Court to extend it. Whether the defendant would have agreed to such an extension is another matter. However that may be, our duty is to construe the contract as the parties have framed it, and I have come to the clear conclusion that on the construction of that contract it is confined strictly to the practice as a solicitor, and, further, that by merely acting as a managing clerk to another solicitor the defendant, although he is himself a solicitor, and although he is in a position to practise as such, is not in fact himself practising as a solicitor within the meaning of the covenant. If a managing clerk holds a certificate which entitles him to practise, it may be difficult under certain circumstances to ascertain whether he is himself practising as a solicitor or not; but I think the test in every case must be whether in the work he is doing the relation of solicitor and client is constituted between him and the client for whom he is acting. Applying that test to the present case, the evidence shows that the defendant has not hitherto practised as a solicitor, and I do not find any evidence that he threatens or intends so to practise in the future. He is now acting merely in the capacity of managing clerk to a practising solicitor, and as such the legal work which he is doing is work done for and on behalf of his employer. So long as he conducts himself in the way in which he has been conducting himself hitherto I am of opinion that there is no ground for granting an injunction to restrain him from infringing the covenant, first, because there has been no breach of the covenant in fact, and, secondly, because there is no evidence that there is any threat or intention on the part of the defendant to commit a breach of the covenant in the future.

Mr. Van den Berg has relied upon two decisions dealing with covenants in a different form and entered into under

different circumstances. As regards *Mallet's* case (1), it is quite plain to me that the Court laid much stress upon the particular words of the covenant, which were "not to set up *or carry on* the profession or business of a surgeon." The expression "carry on" is wider than the expression "set up" and the Court held that acting as an assistant to a surgeon came within the covenant, regard being had to the tenor of the agreement as a whole. That case seems to me to afford no support to the proposition that the word "practise" here has the extended meaning contended for. The other case is *Robertson* v. *Willmott* (2), where Warrington J. held that the terms of the agreement which the Court had to construe were to the same effect as those in *Mallet's* case (1), and that *Mallet's* case (1) governed the construction of the agreement. Whether the learned judge was right or wrong in coming to this conclusion is a question upon which I do not propose to express any opinion; it is quite enough to say that that case does not bind this Court in construing the agreement in the present case.

For the reasons I have stated I am of opinion that the appeal succeeds and ought to be allowed.

RUSSELL L.J. Inasmuch as we are differing from the learned judge in the Court below, I desire, out of respect to him, to add a few words. The sole relevant fact in this case appears to me to be this, that Mr. Bishop's partnership with Mr. Way having come to an end, he has entered the employ of a solicitor, Mr. Wadeson, who has an office in Portsmouth, as his managing clerk at a fixed salary; and the question for decision is whether in so doing he has committed a breach of clause 22 of the partnership articles under which he has bound himself "not to practise in the borough of Portsmouth" for a particular time. "Not to practise" in that clause must mean and can only mean not to practise as a solicitor. The wording of a clause such as clause 22, being a clause in restraint of trade, should not in my opinion be unduly stretched so as to be generous to

(1) 36 Ch. D. 411. (2) 25 Times L. R. 681; [1909] W. N. 155.

C. A. 1928 WAY v. BISHOP. Russell L.J.

the person in whose favour the covenant is entered into. It is a clause which should be looked at, if anything, narrowly. In my opinion, the natural meaning of the words "practising as a solicitor" is acting as a solicitor in such circumstances as that the relation of solicitor and client will arise as between the covenantor and the persons whose affairs he is transacting. In my opinion, the phrase "practising as a solicitor" connotes a person who is a principal; it connotes a person who has clients: it connotes a person, in short, who has a practice, and the words are not apt words to describe the position of a person who is acting as the servant of another who is practising as a solicitor. As regards *Robertson* v. *Willmott* (1), it is sufficient to say that it can be distinguished from the present case inasmuch as the profession there being dealt with was that of architect and not the profession of a solicitor, the peculiarities and specialities of which have been pointed out by Lawrence L.J. in his judgment. I am in agreement with the other members of the Court, and in my opinion the appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Samuel Price, Sons & Robertson, for R. H. Wadeson & Son, Portsmouth.*

Solicitors for respondent: *Cardew Smith & Ross.*

(1) 25 Times L. R. 681; [1909] W. N. 155.

W. I. C.

EVE J.
1928
May 17.

In re MARSHALL.

GRAHAM *v.* MARSHALL.

[1928. M. 103.]

Will—Construction—Absolute Gift—Cutting down absolute Gift—Failure of Gift over—Original Gift valid.

A testator directed that his trustees should, after the death or remarriage of his wife, stand possessed of a trust fund and the income thereof upon trust to divide the same into seven parts, and to pay or transfer two seventh parts thereof to his son, M. M., provided always that such two seventh parts should not vest absolutely in M. M., but should be retained by the trustees, and be held by them upon the trusts thereinafter declared concerning the same, and in the event of the death of M. M. without any children him surviving, then the testator directed that the two seventh parts should sink into and form part of his residuary estate thereinafter mentioned, and he directed that his trustees should divide his residuary estate among such charitable or benevolent objects as they should in their absolute discretion select. The testator died in 1924. M. M. died in 1926, a bachelor and intestate. The gift over of the residuary estate was held to be invalid:—

Held, that the gift over having failed, the rule in *Lassence* v. *Tierney* (1849) 1 Mac. & G. 551 and *Hancock* v. *Watson* [1902] A. C. 14 applied, and that the share of M. M. passed to his legal personal representative.

In re Payne [1927] 2 Ch. 1 distinguished.

THE testator by his will dated May 10, 1923, appointed executors and trustees thereof, and, after making various pecuniary and specific bequests, he devised and bequeathed all his real and personal estate unto and to the use of his trustees upon trust for conversion as therein mentioned, and he directed that his trustees should, out of the moneys to arise from the sale, calling-in, or conversion of his real and personal estate, make such payments as in his will mentioned, and should invest the residue of such moneys, thereinafter called "the trust fund," in the manner therein mentioned, and pay the income thereof to his wife during her life or widowhood, and after her death, or remarriage, the trustees should stand possessed of the trust fund and the income thereof "upon trust to divide the same into seven parts, and to pay or transfer two seventh parts thereof to my son Matthew Marshall, and another two sevenths to my son Aubrey Jeaffreson Marshall, and one seventh to each of my daughters, Gwendolyn Doris

EVE J.
1928
MARSHALL, *In re.* GRAHAM *v.* MARSHALL.

Rose Gresswell, Monica Renee Marshall, and Lettice Ray Marshall, provided always and I declare that the share of the trust fund which is hereinbefore expressed to be given to my son Matthew Marshall and to my said daughters shall not vest absolutely in them, but shall be retained by my trustees, and be held by them upon the trusts hereinafter declared concerning the same respectively," and in the event of the death of Matthew Marshall without leaving any children him surviving, then "I direct that the said share shall sink into and form part of my residuary estate hereinafter mentioned," and he directed that his trustees should divide his residuary estate among such charitable or benevolent objects as they should in their absolute discretion select. By a codicil dated November 10, 1923, the testator revoked the bequest of income of the trust fund to his wife, and directed his trustees to pay to her, during her life or widowhood, an annuity of 2500*l.* per annum, and to each of his children an annuity of 200*l.* per annum. The testator died on September 28, 1924, leaving his wife and all five children him surviving. Matthew Marshall died on November 21, 1927, a bachelor and intestate, and letters of administration of his estate were granted to the testator's widow, the only next of kin.

Under these circumstances, the trustees took out this summons—asking, in the first instance, whether the gift of the residue was valid or invalid. Eve J. held that the gift was invalid. The summons then asked whether, such gift being invalid, the share which upon the death of Matthew Marshall without leaving issue was directed to sink into and form part of the residuary estate: (*a*) passed as upon an intestacy of the testator, or (*b*) belonged to the testator's widow as legal personal representative of Matthew (subject in either case to the trusts affecting income during her lifetime).

A. C. Nesbitt for the plaintiffs.

Norman Daynes for the legal personal representative of Matthew Marshall. The rule in *Lassence* v. *Tierney* (1) applies

(1) 1 Mac. & G. 551.

here, and the legal personal representative of Matthew takes his shares of the trust fund. There was an absolute gift in the first instance, which was subsequently cut down. This case is not governed by the decision of Astbury J. in *In re Payne* (1), where the direction was to "appropriate"; here the direction is to "pay or transfer." The decision in that case is inconsistent with the judgment of Joyce J. in *In re Cohen* (2), which was followed by Peterson J. in *In re Hayman.* (3) *In re Payne* (1) did not decide that the rule in *Lassence* v. *Tierney* (4) does not apply to the common form used in Key & Elphinstone's Precedents of Conveyancing, 12th ed., vol. ii., Part. 2, p. 810.

C. A. Bonner for the surviving children of the testator. The words "pay or transfer," followed by directions intended to cover every possible event which could be foreseen by the testator, cannot have greater force than the word "appropriate." The present case must therefore be governed by *In re Payne.* (1) On the construction of the will, the testator has not made, in the first instance, a clear gift. The rule in *Lassence* v. *Tierney* (4) does not apply here, and the share of Matthew was undisposed of by the will of the testator.

EVE J. But for the recent decision of Astbury J. in *In re Payne* (1), I should not have much hesitation in holding that what has come to be called the rule in *Lassence* v. *Tierney* (4) applies in this case. I have here what is in substance an absolute gift to Matthew followed by a settlement, introduced, it is true, by a declaration that the shares given to Matthew and the daughters are not to vest absolutely in them, but are to be retained upon certain trusts. Those introductory words do not effect more than would be effected if the testator had merely directed his trustees to retain the share upon certain trusts instead of paying it over to Matthew. But in *In re Payne* (1) the language was a little different, and the learned judge seems to have relied upon the language in that case. The language there was "in trust to appropriate one of such

(1) [1927] 2 Ch. 1.
(2) (1915) 60 Sol. J. 239.
(3) June 2, 1920. Not reported.
(4) 1 Mac. & G. 551.

EVE J.
1928
MARSHALL, *In re.* GRAHAM *v.* MARSHALL.

shares to each of my sons now living." Astbury J. came to the conclusion that this language, coupled with a declaration that the shares were not to vest absolutely, prevented there being any point at which the Court could say there was an absolute gift of the one-fifth to the eldest son, and I should not presume to suggest that the construction which he placed upon that will was otherwise than correct. But I am dealing here with a will not so worded, and in my opinion I should be departing from the high authority to be found in the speech of Lord Davey in *Hancock* v. *Watson* (1) were I, having here an absolute gift qualified by the imposition of trusts, all of which have failed, to hold that on the failure of the particular trusts the absolute gift did not survive. In my opinion it did survive, and in the circumstances of this case the interest of Matthew under his father's will passed to his legal personal representative, his mother.

Solicitors: *Hancock & Willis, for Jonathan Couch, St. Austell; The Treasury Solicitor.*

(1) [1902] A. C. 14.

P. J. B.

In re A DEBTOR.

Ex parte LAWRENCE.

[21 of 1928.]

ASTBURY and TOMLIN JJ.

1928

May 10, 16.

Bankruptcy—Debt over 50*l. payable by three Instalments—Judgment for two Instalments together under* 50*l.—Invitation to pay final overdue Instalment —Tender—Refusal—Bankruptcy Notice on Judgment Debt—Subsequent Petition on total Debt—Discretion of Court—Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 5, *sub-s.* 3.

On January 3, 1928, a creditor obtained judgment for 47*l.* in respect of two overdue instalments of a debt, leaving the remaining 23*l.* instalment, which only became due between the date of the writ and the judgment, untouched by the judgment.

On January 9, in response to the creditor's invitation, the debtor tendered the 23*l.* in cash, but the tender was refused.

On January 27 the creditor filed a bankruptcy notice in respect of the 47*l.* judgment debt, and on February 16 he filed a petition based on the two debts, and on non-compliance with the bankruptcy notice :—

Held, that though the two debts were still owing and amounted to over 50*l.*, so that the creditor was formally entitled to present a petition under s. 4, sub-s. 1, of the Bankruptcy Act, 1914, nevertheless, the refusal before the bankruptcy notice of the 23*l.* offered at his invitation, and refused only in order to keep the total debt over 50*l.*, was " sufficient cause " within s. 5, sub-s. 3, for making no order on the petition.

Ex parte Astrup (1879) 11 Ch. D. 303 applied.

Appeal from Manchester County Court.

On March 1, 1927, the debtor agreed by way of guarantee to pay the petitioning creditor, Henry Percy Lawrence, 71*l.* odd by three instalments of 23*l.* odd in October, November and December, 1927.

On December 12, 1927, when only two instalments were due, the petitioner issued a writ in the High Court for 61*l.* odd, being the entire debt, less 10*l.*, credited as paid, and on January 3, 1928, he obtained judgment for 47*l.* odd, being the two instalments (less the 10*l.*) and costs, leaving the remaining 23*l.*, the third instalment, which had become due by December 31, untouched by the judgment.

On the same day, Tuesday, January 3, 1928, the petitioner's solicitors wrote to the debtor's solicitors as follows : " Confirming our conversation on the telephone we write to say

ASTBURY and TOMLIN JJ.

1928

A DEBTOR, *In re.*

LAWRENCE, *Ex parte.*

that our client will not proceed on the judgment he has obtained to-day until Thursday morning next, by which time we understand you will have obtained instructions. Unless some satisfactory arrangement be made with regard to the balance of the debt for which judgment was not obtained our instructions are to issue a writ, and we shall be glad to know whether you have instructions to accept service thereof."

On January 4, 1928, the debtor sent the petitioner a cheque for the 23*l.*, the third instalment, and asked for time to pay the judgment debt.

On January 6 the petitioner's solicitors wrote to the debtor's solicitors, stating that on their advice the petitioner was not clearing the cheque for the moment, " but will hold it until he has received satisfaction in respect of the amount for which he has obtained judgment."

On January 9, 1928, the debtor wrote to the petitioner stating that as the 23*l.* cheque was not cashed, he had stopped payment thereof, and in lieu thereof he enclosed 23*l.* odd in notes and cash.

This was received by the petitioner on January 10, and on January 11 he returned it saying that he was not prepared to accept any payment less than the full amount of the guarantee with costs.

On January 27, 1928, the petitioner filed a bankruptcy notice in the Manchester County Court in respect of the 47*l.* judgment debt. This filed notice was in proper form, but the sealed copy thereof served the same day on the debtor under the Bankruptcy Rules 143 and 155, contained an unfortunate clerical error in the petitioner's surname in the initial direction for payment. It directed the debtor within seven days after service to pay Henry Percy Lancaster (*sic*), of 4 Grove Road, Willesden [the petitioner's address] the sum of 47*l.* claimed by Henry Percy Lawrence, the amount due on a final judgment obtained by him against the debtor on January 3, 1928, or to satisfy the Court of a counterclaim, set-off or cross demand equalling or exceeding the sum claimed by him, which could not be set up in the action.

The indorsed note stated that if the debtor had a counter-claim, set-off or cross demand which equalled or exceeded the amount claimed by Henry Percy Lawrence in respect of the judgment and which the debtor could not set up in the action he might apply to set aside the notice.

On February 16, 1928, the petitioner presented a petition for a receiving order in the Manchester County Court, alleging that the debtor owed him 71*l.* odd, made up of the 47*l.* odd judgment debt and the 23*l.* odd final instalment, and that he had failed to comply with the bankruptcy notice of January 27.

On March 14 the registrar dismissed the petition, apparently on the ground that owing to the tender of the 23*l.* the petitioner's debt was under 50*l.*, and also on the ground of the irregularity in the sealed copy bankruptcy notice.

The letter of January 3 virtually inviting payment (inter alia) of the overdue 23*l.* was not before him, and he was not asked to exercise any discretion under s. 5, sub-s. 3.

The petitioner appealed.

du Parcq K.C. and *H. Infield* for the petitioner. The tender was too late, and the petitioner was not bound to accept it. The whole debt is still owing: *Poole* v. *Tumbridge* (1); *In re Andrew.* (2)

The error in the sealed copy bankruptcy notice was only a formal defect within s. 147.

[ASTBURY J. The tender, though out of time, was before the bankruptcy notice. I do not quite like your refusing it. We may send the case back to the registrar to exercise his discretion.]

Tindale Davis for the debtor. That is quite unnecessary. This appeal is a rehearing, and the Court can exercise its own discretion under s. 5, sub-s. 3.

On the general question of tender see Bullen and Leake's Precedents, 8th ed., p. 823. This tender was really made before the bankruptcy notice in response to the petitioner's virtual invitation contained in the letter of January 3, which

(1) (1837) 2 M. & W. 223, 226. (2) (1875) 1 Ch. D. 358, 360, 361.

ASTBURY and TOMLIN JJ.

1928

A DEBTOR, *In re.*

LAWRENCE, *Ex parte*

was unfortunately not before the registrar. Surely, after that letter, the petitioner was not entitled to refuse the tender in order to keep his total debt over 50*l.* That was an abuse of the bankruptcy law: *Ex parte Astrup.* (1) Of course I am ready, and undertake to pay the 23*l.* at once.

Again, the mistake in the sealed copy of the bankruptcy notice served under rr. 143 and 155 made the notice bad, so that non-compliance was not an act of bankruptcy. Bankruptcy notices involving quasi-penal consequences are construed very strictly, and mistakes are not lightly treated as formal defects within s. 147: *In re Howes* (2); *In re A Judgment Debtor* (3); *In re A Debtor.* (4)

du Parcq K.C. in reply. The invitation was to pay the whole debt which was really due and owing. The debtor tendered part so as to reduce the amount under 50*l.* The petitioner was not obliged to accept that: *In re Andrew.* (5)

In *Ex parte Astrup* (1) the creditors, in order to make their debt over 50*l.*, had taken up an accepted 30*l.* bill which they knew the debtor disputed as obtained by fraud. There is nothing of that sort here. The whole debt is admittedly owing.

Again, the mistake in the sealed copy bankruptcy notice was an obvious slip, which could not and did not mislead or embarrass the debtor, who knew his judgment creditor's full name and address. The judgment creditor's name is correctly given, and the debtor is told of his rights in case he has any set-off against that creditor. The only slip is that he is directed to pay the judgment debt to Henry Percy Lancaster of 4 Grove Road, Willesden, which is in fact the judgment creditor's address. In these circumstances this slip was only a formal defect within s. 147: *In re Low* (6); *In re Wenham.* (7)

If I am right on these two points there is no ground for exercising any discretion in the debtor's favour under s. 5, sub-s. 3.

(1) 11 Ch. D. 303, 305.
(2) [1892] 2 Q. B. 628, 632.
(3) [1908] 2 K. B. 474, 477, 481.
(4) [1908] 2 K. B. 684.
(5) 1 Ch. D. 358, 360, 361.
(6) [1895] 1 Q. B. 734.
(7) [1900] 2 Q. B. 698, 706, 709.

ASTBURY and TOMLIN JJ.
1928
A DEBTOR, *In re.* LAWRENCE, *Ex parte.*

ASTBURY J. [after stating the facts and pointing out that the letter of January 3, 1928, really amounted to an intimation that the petitioner would give the debtor until Thursday, January 5, to pay the 47*l.* judgment debt, and unless the 23*l.* which had become owing was paid a fresh writ for that would be issued, continued :] Various points were taken before the registrar as to the tender and as to the irregularity in the sealed copy bankruptcy notice which I do not propose to discuss, and, in the result, the registrar dismissed the petition apparently on the points raised before him, and without dealing or being asked to deal with any question of discretion.

Now under s. 4, sub-s. 1, of the Bankruptcy Act, 1914, a creditor is not entitled to present a bankruptcy petition unless the debt owing to him or his co-petitioners (if any) amounts to 50*l.* At the date of this petition there were, in a sense, two debts owing by the debtor to the petitioner : (*a*) the 47*l.* judgment debt and (*b*) the 23*l.* instalment debt, for which the debtor had offered cash, which the petitioner had refused. The tender being made at the time and in the circumstances in which it was made was not of course a legal tender so as to extinguish the debt, and at the date of the petition there were therefore two debts, together amounting to over 50*l.* But the debtor had on the petitioner's invitation offered him cash for the latter 23*l.* debt, and if that had been accepted the total debt would have been under 50*l.*

Sect. 5, sub-s. 3, provides that if the Court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, " or that for other sufficient cause no order ought to be made," the Court may dismiss the petition.

Now this matter comes before us by way of rehearing, and we have to decide whether, on this appeal, a receiving order ought to be made or not.

Speaking for myself I think, without any hesitation, that a device of this character ought not to succeed, and that where at the creditor's request part of a debt is tendered

ASTBURY and TOMLIN JJ.

1928

A DEBTOR, *In re.* LAWRENCE, *Ex parte.*

in cash before the bankruptcy notice, and refused, because, if accepted, it would leave a debt of less than 50*l.*, then although the tender in the circumstances is not a legal tender, and the whole debt is still owing, we ought not to allow this quasi-penal statute to be put into operation against the debtor. How the debtor intended to meet the 47*l.* judgment debt I do not know. But the fact remains that the petitioner could have had no reason for refusing the 23*l.* tendered at his invitation, except the reason that its acceptance would have reduced his debt under 50*l.* In these circumstances I am of opinion that there is "sufficient cause" for making no order on this petition.

[His Lordship then dealt with the question of the irregularity in the sealed copy bankruptcy notice, pointing out that the authorities on bankruptcy notices were very fine, and that if it had been necessary to decide the point he would have had to consider them carefully. His Lordship continued :] In my judgment there is ample ground on the first point for refusing to make a receiving order, and in these circumstances I do not propose to deal with the question of the bankruptcy notice. The appeal fails, and must be dismissed with costs.

TOMLIN J. I agree. I only desire to add with regard to the first point that the principle to be applied to the circumstances of this case is that applied by James L.J. in *Ex parte Astrup.* (1) To make a receiving order in the circumstances of this case, having regard to the petitioner's conduct in refusing payment of the 23*l.* tendered on his invitation, in order to keep his debt over 50*l.*, would be to make an order in his favour in a proceeding tantamount to an abuse of the bankruptcy law.

Appeal dismissed; leave to appeal refused.

Solicitors: *Herbert Baron & Co.; Harrison, Fielder & Co., for Wise & Wise, Manchester.*

(1) 11 Ch. D. 303, 305.

G. R. A.

HOSKYNS-ABRAHALL *v.* PAIGNTON URBAN DISTRICT COUNCIL.

EVE J.
1928
April 1, 2, 18; *May* 3.

[1926. H. 4066.]

Burial—Cemetery—Private Vault—Grant of Right of Burial—Access to Vault by Grantee—Claim to enter and perform ceremonial Rites—No absolute Interest in Grave—Easement—public Order—Injunction—Cemeteries Clauses Act, 1847 (10 & 11 *Vict. c.* 65), *ss.* 40, 42—*Public Health* (*Interments*) *Act*, 1879 (42 & 43 *Vict. c.* 31), *s.* 2, *sub-s.* 2.

The rights of the grantee of a grave or vault in a cemetery, under the Cemeteries Clauses Acts, are rights of interment of the dead therein, of erecting or constructing a monument or vault, and of keeping such monument or vault in reasonably good repair, subject to the regulations of the burial authority, and with its consent. The grantee has no freehold interest in the grave or vault, and no right to use the same for the purpose of performing private rites or ceremonies, or to open and enter the vault or tomb for the purpose of depositing any articles therein, without the consent of the burial authority.

McGough v. *Lancaster Burial Board* (1888) 21 Q. B. D. 323 applied.

Witness Action.

The plaintiff, Miss Gertrude Remira Hoskyns-Abrahall, was the grantee under two grants made on July 19, 1915, by the defendants as the burial authority for the parish of Paignton of two grave spaces in Paignton Cemetery numbered 1932 and 1933 respectively, in which the body of her mother, Charlotte Harriet Hoskyns-Abrahall, who died on June 4, 1915, was buried. In April, 1920, the plaintiff purchased two adjoining grave spaces numbered 1962 and 1963, and obtained a licence from the defendants, upon payment of 5*l.* 5*s.*, to construct a vault thereon, partly above and partly below ground, in which the coffin of the deceased lady was placed. Access could be obtained to the interior of the vault by a door of which the plaintiff had a key, and to reach which a stone slab had to be removed. Under the rules and regulations made by the defendants for the cemetery, the written consent of the defendants was necessary for the opening of vaults in respect of which the exclusive right of burial had been purchased. From time to time between 1920 and November, 1924, the plaintiff visited the cemetery,

EVE J.
1928
HOSKYNS-ABRAHALL v. PAIGNTON URBAN COUNCIL.

and was permitted by the caretaker, without the knowledge of the defendants, to open and enter the vault and to deposit various articles therein. This practice having been brought to the knowledge of the defendants, they withdrew the permission given by the caretaker, and instructed him to refuse the plaintiff access to the interior of the vault. The plaintiff, having on several occasions since then endeavoured by herself or an agent to visit and enter the vault, and to perform certain ceremonies and deposit various articles therein, a correspondence took place between the parties, in which she claimed the right to do so. The plaintiff's actions in the cemetery became a matter of public notoriety, and the maintenance of good order was seriously prejudiced. Having again been prevented from entering the vault in December, 1926, the plaintiff commenced this action.

The plaintiff claimed a right of access to the vault for the purpose of cleaning and ventilating it, and in order to observe the "traditional Christian religious rites of the plaintiff's family and other Christian rites connected with the tendance of the remains of the dead." She alleged that the defendants had on divers occasions prevented her from exercising her right of access to the vault, that she had an absolute property therein, and was entitled to enter it and perform such rites and acts as she pleased therein, and claimed a declaration that any regulation of the defendants contrary to such absolute right was ultra vires, and an injunction to restrain them from interfering with or preventing her in the exercise of her rights in any way, and damages for having obstructed her in such exercise.

The defendants denied that the plaintiff had any absolute property in the vault, or any right other than a right of burial in the grave spaces granted to her and the vault erected thereon, and a right of access thereto subject to the by-laws, and with the consent of the defendants, and counterclaimed for a declaration that she was not entitled to open the vault save for the purpose of interment therein subject to the by-laws, rules and regulations, and for an injunction to restrain the plaintiff from placing any articles in the vault,

except articles approved by the defendants, and from doing any other act or thing calculated to hinder the defendants in the proper and seemly maintenance of the cemetery.

The evidence as to the vault and its construction and the proceedings of the plaintiff in the cemetery upon various occasions and the steps taken by the defendants, is fully set out by the learned judge in his judgment.

G. B. Hurst K.C. and *Dr. H. H. L. Bellot* for the plaintiff. The vault and tomb are the property of the plaintiff by right of purchase and grant. That includes the right of access and egress for the purpose of ventilating, cleaning and repairing. The plaintiff also claims the right to perform certain acts of piety in accordance with ancient Christian practices, particularly those of the Orthodox Greek Church. As against these claims, the defendants contend that the plaintiff has only a right of access to the vault for the purpose of interment. In *Sims* v. *London Necropolis Co.* (1) Lord Coleridge said that the right of interment carried with it the right to put up a memorial, with the approval of the cemetery company. The only other two cases on the subject are *Ashby* v. *Harris* (2) and *McGough* v. *Lancaster Burial Board* (3), where the general control of a burial board was considered.

Vaisey K.C. and *C. E. Harman* for the defendants. The plaintiff has the right and is under the duty of keeping the vault in repair, but otherwise can only use it as a burial vault and not as a private chapel. The defendants have a right to prevent the plaintiff from putting food, wine, and other articles in the vault, and it is their duty, especially to that section of the public which has graves in the cemetery, to prevent any such unseemly and irregular proceedings, which, having become notorious, have caused crowds of people to assemble at times. The plaintiff has no freehold interest in the grave spaces: *Spooner* v. *Brewster* (4); *Frances* v. *Ley* (5); *McGough* v. *Lancaster Burial Board* (3); *Reg.* v. *Abney Park*

(1) (1885) 1 Times L. R. 584.
(2) (1868) L. R. 3 C. P. 523.
(3) 21 Q. B. D. 323.
(4) (1825) 3 Bing. 136; 2 C. & P. 34.
(5) (1615) Cro. Jac. 366.

EVE J.
1928
HOSKYNS-ABRAHALL v. PAIGNTON URBAN COUNCIL.

Cemetery Co. (1); *Vestry of St. Giles* v. *London Cemetery Co.* (2); Cemeteries Clauses Act, 1847, s. 40.

Under r. 7 of the Cemetery Regulations, the council requires written authority to open or to reopen a grave or vault of which the exclusive right of burial has been purchased. It is submitted that the plaintiff may only use the vault for interment, to make reasonable repairs to it when required, to secure its reasonable ventilation, and to inspect its condition not oftener than twice in every year, upon forty-eight hours' notice to the defendants and in the presence of their representative.

G. B. Hurst K.C. in reply.

Cur. adv. vult.

May 3. EVE J. The defendants are the burial authority for the Parish of Paignton, and as such the owners of the cemetery known as the Paignton Cemetery, acquired, constructed and maintained under the provisions of the Public Health (Interments) Act of 1879, with which is incorporated the Cemeteries Clauses Act of 1847. In July, 1915, and in April, 1920, the defendants, by virtue of the powers conferred on local authorities under the Act of 1879 and the other Acts incorporated therewith, by four several instruments and for the consideration therein respectively mentioned, granted to the plaintiff the exclusive right of burial in four contiguous grave spaces part of the cemetery set apart for the burial of the dead according to the rites of the Established Church and numbered 1932, 1933, 1962 and 1963 respectively, to hold the same to the plaintiff for the purposes of burial, subject to the regulations then in force or which thereafter might be issued with regard to interments in the cemetery by the Home Secretary or by the defendants or by any other competent authority. The grants were made under s. 42 of the Cemeteries Clauses Act according to the form scheduled to that Act.

In 1915 the body of the plaintiff's mother was buried, in the first instance, in what was described as an urban grave, on one of the earlier acquired spaces. Later on, when the two additional spaces were acquired in 1920, permission was given,

(1) (1873) L. R. 8 Q. B. 515. (2) [1894] 1 Q. B. 699.

in consideration of a money payment of 5*l.* 5*s.*, for the erection of a vault on the four spaces; the coffin was not moved, but was enclosed in a brickwork cell on the top of which stone slabs were bedded in cement, and the vault, some seven or eight feet long and five feet wide, was so erected partly below and partly above ground as to enclose along one side the brick and stone receptacle in which the coffin lay and to leave a narrow causeway some eighteen inches to two feet wide between the edge of the receptacle and the other side wall of the vault. The stone slabs on the top of the receptacle form a shelf or table along one side of the vault. Access to the interior of the vault was obtained by means at one time of a door fitted with a lock of which the plaintiff had one key and at a later date by a panel or shutter which was closed by screws. The door and shutter could be reached by descending into a hole a few feet deep dug outside and at one end of the vault and accessible on the removal of a stone slab laid over it.

In this action the plaintiff is alleging that the defendants have on divers occasions wrongfully prevented her from exercising her right of access to the vault, and is claiming a declaration of title and other relief on the footing that the property of the vault is in her, that she is entitled to visit, open and enter into the vault whenever she pleases for the purpose of performing certain alleged traditional family and Christian rites connected with the tendance of the remains of the dead and for other purposes, and that any regulation of the defendants contrary to this absolute right is ultra vires.

Before proceeding to inquire further into these allegations and claims it is desirable to appreciate what was the nature of the grants made to the plaintiff in 1915 and 1920, and what were the rights thereby conferred upon her. The grants were made in exercise of the statutory powers contained in s. 40 of the Cemeteries Clauses Act of 1847, whereby the defendants are empowered to set apart such part of the cemetery as they think fit for the purpose of granting exclusive rights of burial therein, and to sell either in perpetuity or for a limited time and subject to such conditions as they may think fit the

EVE J.
1928
HOSKYNS-ABRAHALL v. PAIGNTON URBAN COUNCIL.

exclusive right of burial in any parts of the cemetery so set apart and the right of placing any monument or gravestone in the cemetery. On the authority of the judgment of the Court of Appeal in *McGough* v. *Lancaster Burial Board* (1) the effect of these grants must be measured by the statutory powers contained in the section I have referred to. The defendants had no power to grant the plaintiff a freehold estate in any part of the cemetery; all they could sell was the exclusive right of burial therein and as incident thereto the right to dig a grave, and I will assume, though there is no express mention of a vault in the section, to construct a vault for the reception of the body. A vault, after all, is but a repository for the dead of a rather more elaborate and permanent construction than an ordinary grave, and in the by-laws made by the defendants with respect to the management of the cemetery the word is defined as including underground burial places of every description, except those formed in the ground by excavation and without any internal wall of brickwork or stonework or any other artificial lining.

With the exercise by the plaintiff of the rights I have mentioned there has been no interference by the defendants. She was allowed to exercise her right of burial and later on to erect the vault, and it has never been suggested by the defendants that the licence or permission to erect the vault was other than an irrevocable one. But the plaintiff asserts that her rights are not limited to the exclusive right of burial and the maintenance of the vault. She seeks a declaration that the property in the vault is vested in her. What does such a claim involve? That the whole vault, including the land in and on which it has been built and the area enclosed within it and the means of access to it were all conveyed to the plaintiff by the grants of the exclusive right of burial and the subsequent licence to build the vault. In the face of the authority, to which I have referred, no such declaration can be made. The conclusion that the plaintiff has no such property in the premises as she is seeking to assert is not inconsistent with her having an interest therein

(1) 21 Q. B. D. 323.

of the nature of an easement and such a property in the materials of which the vault is constructed as to entitle her, in so far as the structure can be regarded as a monument or gravestone, to recover damages for its removal or defacement, but no question of this nature is involved in the present proceedings.

Apart then from the declaration of complete ownership of the vault, which I hold to be unsustainable, what is it that the plaintiff is claiming in this action? It is in substance an injunction to restrain the defendants from preventing her at her own pleasure opening and entering into and using the vault for—I am about to read para. B of the particulars of para. 4 of the statement of claim—"the purpose of the observance of the traditional Christian religious rites of the plaintiff's family and other Christian rites connected with the tendance of the remains of the dead and for the purposes of repairing and ventilating the said tomb." The two last purposes can be disregarded, as no evidence has been produced that the vault has ever been out of repair, and so far as ventilation is concerned the defendants, as appears by the correspondence on pp. 8 to 11, granted permission in 1923 for the construction of additional ventilators in accordance with the proposals of Mr. John Bevan, an architect employed by the plaintiff. The plaintiff, however, would not allow Mr. Bevan to proceed with this work.

There remains, therefore, the claim to use the vault for the performance of certain alleged Christian rites. It appears that for the first four years after the construction of the vault the plaintiff paid an annual visit to the cemetery and entered into the vault, carrying with her, as she says, "the usual vault furniture," that is to say, a small chair, table, screen, vessels for flowers and several aromatic gums and deodorizers. The caretaker of the cemetery, who knew of these visits and opened the vault for the plaintiff, did not inform the clerk of the defendants thereof until November, 1924, and the latter thereupon instructed the caretaker that no further entry into the vault must be permitted without the leave of the council.

EVE J. 1928 HOSKYNS-ABRAHALL v. PAIGNTON URBAN COUNCIL.

The plaintiff again visited Paignton in December, 1924, and in January, 1925, the solicitors whom she had consulted were informed that the Council were not prepared to allow the vault to be opened except for the purpose of future interments, and the plaintiff was in fact prevented from entering on the 17th of that month. The plaintiff thereupon engaged a firm of stonemasons to prepare plans for a mausoleum which she contemplated erecting, and in February an employee of the firm obtained access to the vault in certain circumstances and for purposes disclosed in the letter written by him to the plaintiff on the 18th of that month. It is at p. 41 of the correspondence, and I read the following extracts from it as relevant to the matters now under consideration. He writes: "Your letter did not arrive until second post this A.M. and I was unable to give you the 24 hours' notice you wished for before opening the vault—having made my arrangements yesterday to go to Paignton Cemetery to-day. At my last visit to Paignton Town Hall I was assured by the officials there that everything was in order for me to enter the vault and that they would notify the cemetery caretaker at an early date to that effect. That was about a week ago. On getting to the cemetery to-day at 1.50, I was not allowed to commence operations, the caretaker saying he had not been informed of the permission granted to me by the Town Clerk. Together we 'phoned, we waited, we visited his house, we 'phoned again; no answer came during this waiting of $1\frac{3}{4}$ hours so I made a personal visit to the town hall, saw the man I wanted, he 'phoned through to the cemetery caretaker for me to proceed with taking particulars for ventilators, etc. To hurry up I taxied to the cemetery and on arriving there I, together with another of our firm's men, removed the flag stones, opened the door and waited a little. I had the lamp lit, made the charcoal hot, put it in the swinging receptacle and carried out your instructions of waving it in front of the opening gradually lowering until I entered the vault. The cypress branches I burnt too. The food I cleared from the top of the tomb and swept that part clearing everything away. The food from the tables was cleared too. I removed

a lot of sawdust, but on account of no fresh supply of cypress sawdust I left most on the floor as I had found it. The tumbler was washed and I poured the wine in the tumbler and placed it on the tomb, previously tasting a little as you wished. The wine was quite good. I must admit I forgot to buy coffee or milk and due to the day being Wednesday, which is early closing day at Paignton, I was unable to obtain any. I was not able to procure a tent at this stage. At about 5.30 P.M. I closed the door and replaced the flag stones knowing it was the wish of the cemetery company. These of course can be permanently removed as soon as the ventilator, perforated door and top trap doors are fixed. I have taken all measurements for same and shall within the next few days go into designs and prices to submit to you. It is my duty to inform you I was not able to employ the caretaker from the precincts of the vault the whole time. I was, however, able to send him on several errands and so I gained my objective partially. The vault too was very damp and these odours were offensive, due to the stale food and damp. There were a few expenses incurred, two taxi fares, tip to the caretaker (he really acted very much as I wanted him to and put no obstruction in our way once he knew we had official permission). I hope I have acted as you wished me to. I can only assure you I have been to great trouble to carry out your instructions in a sacred way." It is evident from that letter that the plaintiff had left food and drink in the vault on the occasion of a previous visit. The writer wrote to the defendants on the 11th of the next month the letter on p. 52. It is to the Town Clerk, Paignton, dated March 11, 1925: "Dear Sir, re Hoskyns Memorial, Paignton Cemetery. Mrs. Hoskyns writes us wishing us to send a man out to Paignton Cemetery to burn incense and wave it whilst walking around the grave, also to pour liquids through the ventilators into the vault, also to burn candles round the grave. We shall be glad to know if your council will permit this and await to hear your early instructions." Permission was refused, but a week later Mr. Bevan, who had been again instructed by the plaintiff on the subject of further ventilation,

EVE J. 1928 — HOSKYNS-ABRAHALL v. PAIGNTON URBAN COUNCIL.

was allowed to inspect the interior of the vault, and there were then found deposited therein the following articles: two wooden tables, one wooden screen, two large flower pots with plants (evergreens), one mat, seven brass candlesticks, one large bowl, one small mirror, five flower vases, scent bottles, tin half full of camphor, two metal trays, one spirit lamp, one metal purse, four apostle spoons, one tumbler containing wine, a quarter bottle port wine, one cup and saucer, one china plate, one small jug, one plate, two pennies and five florins, and to these were added at the plaintiff's request three bunches of violets, one bottle of Madeira wine, one bottle of oil of lavender, one bottle of oil of lemon, one bottle of essence of vanilla, and a pound tin of coffee.

It is not necessary to pursue the matter in detail. Throughout the years 1925 and 1926 the plaintiff was attempting by various means to gain access to the interior of the vault, and she was again in Paignton in December, 1925, and January, 1926. On the 19th of this latter month she succeeded in evading the caretaker, and with some outside assistance opened and entered the vault. Therein she proceeded to light a methylated spirit lamp and several candles, to burn incense and to cook some meat. The interior of the vault was in great disorder, broken bottles and paper being strewn about, and for her own safety the police sergeant, who had been summoned by the caretaker, unable to induce her to quit voluntarily, superintended her removal from the vault by the caretaker. Shortly afterwards the plaintiff obtained a licence from the Home Secretary for the removal of the body to another cemetery, and in connection with this proposal instructed certain undertakers. The defendants consented to the removal, and with a view thereto allowed access to the vault and the erection of a tent over it, but the plaintiff availed herself of these facilities for purposes more closely connected with the performance of the ceremonial rites, and the tent was removed and the Home Secretary's licence withdrawn when it was appreciated that the plaintiff had no real intention of acting upon it. Unfortunately the proceedings in the cemetery became a matter of public

notoriety, and the maintenance of good order and decorum therein was at times seriously prejudiced. The plaintiff issued her writ in December, 1926, immediately after she had been prevented from entering the vault for the purpose of depositing therein flowers, fruit, a cooked bird, wine, coffee, milk, fleur de lys, orris root, aromatic gums and deodorizers.

The plaintiff insists that her course of conduct is directly incident to her exclusive right of burial, and that in depositing from time to time food and drink and a collection of miscellaneous chattels in the vault she is observing Christian religious rites. It is to be observed that in her statement of claim she asserted and in an affidavit filed on an interlocutory application she swore that both she and her mother were members of the Orthodox Greek Church, and that the rites were those of the Orthodox Greek Church, but in the witness box she said this was due to some mistake, and admitted that she is, and her mother was, a member of the Established Church of England, and that the latter was buried as such.

I am quite unable to accept the plaintiff's view that the rites are of Christian origin or character. They appear to be of a distinctly pagan nature and certainly not consonant with burial according to the ritual of the Established Church. On this ground alone, and irrespective of the fact that the rites are of a recurring description and continued long after interment had taken place, it is impossible to regard the plaintiff's procedure as so connected with the interment as to be covered by the grant of the exclusive right of burial. The plaintiff, in my opinion, has no right in the vault entitling her to use it for the purposes for which she is here claiming a right to use it, and in the circumstances the defendants were justified in refusing her access to the interior of the vault and in removing her therefrom. Her action fails, and is dismissed with costs as between solicitor and client.

The defendants, who it must be remembered are responsible for the upkeep, maintenance and management of the cemetery, have delivered a counterclaim upon which I propose to give them the following relief: first, a declaration in the terms of para. 1 of their counterclaim, except that I propose to

EVE J.
1928
HOSKYNS-ABRAHALL v. PAIGNTON URBAN COUNCIL.

introduce between the second and third lines thereof the words "or of executing any necessary repairs thereto"; and, secondly, as the plaintiff's conduct has already created some scandal, an injunction in the terms of para. 3. They will have liberty to apply for an injunction in the terms of the declaration I have made, and the plaintiff must pay the costs of the counterclaim as between party and party.

Solicitors for plaintiff: *Peacock & Goddard.*

Solicitors for defendants: *Torr & Co., for Eastley & Co., Paignton.*

H. L. L.

EVE J.
1928
May 16.

In re BATES.

MOUNTAIN *v.* BATES.

[1928. B. 458.]

Company—Bonus—Distribution of Cash Bonuses—Proceeds of Sale of Ships—Tenant for Life and Remainderman—Capital or Income.

The directors of a company owning and operating steam trawlers, having sold some of their vessels for sums largely exceeding the values at which they stood in the company's balance sheet, carried the proceeds to a suspense account and afterwards distributed them as cash bonuses to the shareholders, with a covering letter stating that such bonuses were capital payments not liable to income tax or super tax. On a summons taken out by the executors of a deceased shareholder to determine as between the tenant for life and remaindermen entitled under his will whether such bonuses were capital or income:—

Held, that not having been capitalized by the issue of bonus shares increasing the total capital, the payments were income receivable by the tenant for life during her life.

Bouch v. *Sproule* (1887) 12 App. Cas. 385 distinguished.

Maclaren v. *Stainton* (1861) 3 D. F. & J. 202 applied.

ORIGINATING SUMMONS.

The summons was taken out to determine whether certain cash bonuses of 630*l.*, 630*l.*, 63*l.* and 1260*l.* declared by the directors of the Anchor Steam Fishing Company, Ld., and paid to the executors of John George Bates, deceased, between the death of the testator in January, 1919, and the death of his widow in March, 1924, in respect of his shares in the company, or any parts thereof respectively should be treated as capital of the testator's estate, or as income to which the testator's widow was absolutely entitled as tenant

for life under his will. A similar question was also asked as to cash bonuses of 560*l.*, 28*l.* and 56*l.* declared by the directors of the Atlas Steam Fishing Company, Ld., and paid to the testator's executors in respect of his holding of shares in that company.

The testator, John George Bates, by his will dated January 15, 1919, having appointed executors and trustees thereof gave devised and bequeathed all his real and the residue of his personal estate upon trust to permit his wife Eliza Bates to receive the rents and profits during her life and after her death upon trust for all his children living at the testator's death who should attain the age of twenty-one years, if more than one as tenants in common in equal shares. And the testator declared that his trustees might in their absolute discretion allow his trust estate to remain in the same state of investment as at the time of his death and that the whole of the net income arising therefrom for the time being should be deemed annual income, no part thereof being liable to be retained as capital.

The testator died on February 22, 1919, and his will was proved on August 30, 1919. The testator at his death held 63 shares of 10*l.* each in the Anchor Steam Fishing Company, Ld., and 56 shares of 10*l.* each in the Atlas Steam Fishing Company, Ld. Between the death of the testator and the death of his widow in 1924 the executors received the following sums from the Anchor Steam Fishing Company, Ld., under the descriptions below :—

1919.	March 6.	Dividend of 30 per cent., tax free	£189
,,	June 25.	Cash Bonus	630
1920.	March 10.	Dividend of 20 per cent., tax free	163
1921.	May 2.	Cash Bonus	630
1922.	April 4.	Cash Bonus	63
1923.	April 4.	Cash Bonus	1260
,,	Dec. 10.	First distribution of surplus assets by liquidator . .	630
1924.	Jan. 23.	Second ditto . . .	252

EVE J.
1928
BATES, *In re.* MOUNTAIN *v.* BATES.

Similar, but smaller distributions were made in respect of the testator's shares in the Atlas Steam Fishing Company, Ld.

The Anchor Steam Fishing Company, Ld., was incorporated in 1894 with a capital of 30,000*l.* divided into 3000 shares of 10*l.* each, with power to increase such capital.

Art. 85 of the articles of association provided as follows: No dividend shall be paid except out of the profits of the company (arising from the business of the company) as shown upon the balance sheet which shall from time to time have been examined and passed by the auditors.

By art. 86 the directors had power to set aside out of the profits of the company such sum as they should think fit as a reserve fund, and might invest the same upon any securities.

In May, 1919, the secretary of the Anchor Steam Fishing Company sent a circular letter to the shareholders, including the testator's executors, the material parts of which were as follows:—

"Dear Sirs,—The Directors have decided to make a cash distribution to each shareholder equal to his or her capital in the company arising from the sale of three of the company's steam trawlers. It must be clearly understood that this is neither a dividend nor a bonus, but is a capital distribution and therefore not liable to income tax or super tax. In order to carry this into effect it is necessary to alter the articles of association. A copy of the special resolution to authorize this is enclosed herewith."

The special resolution referred to was one altering art. 85 by cancelling the words "arising from the business of the company," and was duly passed by the company in general meeting and confirmed on June 7, 1919. The executor's bankers subsequently received a cheque for 630*l.* from the secretary of the company. Similar distributions were made at later dates upon the same terms.

On November 7, 1923, at an extraordinary general meeting of the Anchor Steam Fishing Company, a resolution was passed for a voluntary winding up, and duly confirmed on November 27, and the surplus assets were subsequently distributed.

The distributions made by the directors of the Atlas Steam Fishing Company, Ld., were on similar terms to the above.

The whole of the sums received by the executors of the testator in respect of cash bonuses and surplus assets were invested by them as capital, and only the income produced by such investments was paid to the tenant for life.

De Montmorency for the plaintiffs, the testator's executors.

Henry Johnston for the executors of the widow. The cash bonus distributed in each case was the distribution of a profit made by the company, and that must be treated as income. It was a windfall for the benefit of the shareholders. The company cannot turn income into capital merely by saying that it must be deemed to be capital. It must be capitalized, and become an accretion to the existing capital, as was done in *Bouch* v. *Sproule*. (1) There, as Lord Herschell said, the substance of the whole transaction was, and was intended to be, to convert the undivided profits into paid up capital upon newly created shares. And see *Maclaren* v. *Stainton*. (2) A company cannot return capital to its shareholders except on an application to the Court to reduce its capital.

Turnbull for the remaindermen. The origin of the fund created by the cash bonuses is the proceeds of sale of capital assets. The company treated the moneys as being already capital throughout. The balance sheets were drawn up on the footing that the company had sold certain trawlers which they did not require. No income tax has ever been deducted or paid from these bonuses. If this was a dividend it should have been declared to be so. On a winding up there could have been no question that these moneys were capital.

Howard Wright for the trustee in bankruptcy of one of the testator's sons. The intentions of the company must be regarded, and if they intended the money to be treated as capital it was capital: *In re Taylor*. (3) The capital of the company was invested in its fishing fleet, the value of which during this period had very greatly appreciated.

(1) 12 App. Cas. 385, 399. (2) 3 D. F. & J. 202.
(3) [1926] Ch. 923.

EVE J. 1928 BATES, *In re.* MOUNTAIN *v.* BATES.

The company was a fishing company, and did not engage in speculations in buying and selling trawlers.

EVE J. When he died on February 25, 1919, the testator was the holder of 63 shares of 10*l.* each in the Anchor Steam Fishing Company, Ld., and 56 shares of 10*l.* each in the Atlas Steam Fishing Company, Ld. The shares were worth more than par, and for the purposes of probate were valued at 18*l.* each.

The material facts are common to both companies, and I need therefore only refer to them in the case of one. The Anchor Company was incorporated with a capital of 30,000*l.* in 3000 shares of 10*l.* each, of which 1500 were issued and fully paid up. The company owned certain steam fishing vessels, some of which were sold at prices considerably in excess of the values attributed to them in the books and balance sheets, with the result that the company, with its capital still intact, became possessed of a surplus in cash, which was invested in War Stock and other securities. These investments appeared on the assets side of the balance sheet, and on the other side was a suspense account made up of two items: one the surplus proceeds of vessels sold in preceding years, and the other surplus proceeds of vessels sold in the particular year to which the balance sheet had reference. In the meantime the company's business was being carried on at a substantial profit, and in the year 1919 two distributions were made: the one a dividend of 30 per cent. upon the paid up capital, representing profits earned, and the other a payment out of the suspense account of a sum equivalent to 10*l.* a share. The executors of the testator received in respect of this latter distribution the sum of 630*l.*

In subsequent years further distributions by way of annual dividends and further payments out of the suspense account were made, and prior to the dissolution of the company the executors received out of the suspense account sums amounting in all to 2589*l.* On the dissolution of the company the assets were more than sufficient to repay all the capital.

The question I have to decide is whether the 2589*l.* is to be regarded as income to which the late tenant for life, the testator's widow, was entitled—she has recently died—or whether the moneys or any part of them belong to those entitled to the capital after her decease. The company undoubtedly, both in anticipation of the distributions and when they were respectively made, was desirous of protecting the shareholders from any claims which might be made for income or super tax on the amounts so distributed, and to that end, alike in the circular letters notifying the intention to distribute as in those accompanying the warrants for the payments, prominence was given to the statement that the payments were being made out of capital and were not in the nature of a dividend or bonus upon the shares. That no doubt was done with the intent, which was indeed expressed, to protect the recipients from liability to taxation, but the mere impressing of these distributions with the appellation of " capital distributions " cannot in my opinion determine their true character. One must inquire a little closer for the purpose of ascertaining whether they were in fact distributions of capital or distributions of something which, although in one sense capital, in that it originated by the realization of assets and not from the ordinary income of the company's business, could not properly be regarded as capital for all purposes. The suspense account represented realized profit on the company's capital assets, and inasmuch as the equilibrium between capital and liabilities on the one side and assets on the other was maintained without any necessity to resort to this fund, it represented what I think is spoken of in one of the cases as " the total appreciation of the capital assets " ; that is to say, if you take on one side the liabilities of the company and on the other the whole of its assets the latter exceed the former by a sum which is in excess of the whole of this suspense fund, or, in other words, no part of it is required to satisfy either the creditors or shareholders of the company. In this state of affairs it was a fund which the company could treat as available for dividend and could distribute as profits, or having regard to its power to increase

EVE J. 1928 BATES, *In re.* MOUNTAIN *v.* BATES.

capital could apply to that purpose by, for example, increasing the capital, declaring a bonus and at the same time allotting to each shareholder shares in the capital of the company paid up to an amount equivalent to his proportion of the bonus so declared. Unless and until the fund was in fact capitalized it retained its characteristics of a distributable profit, and on the authority of the passages which have been read from Lord Herschell's speech in *Bouch* v. *Sproule* (1), the only method by which a company with power to increase its capital can capitalize such a fund is to increase its capital by an amount equivalent to the sum sought to be capitalized. No such procedure was adopted here, and in my opinion no change in the character of the fund was brought about by the company's expressed intention to distribute it as capital. It remained an uncapitalized surplus available for distribution, either as dividend or bonus on the shares, or as a special division of an ascertained profit derived, not from the trading of the company, but from a fortunate appreciation in value of some or other of its capital assets, and in the hands of those who received it it retained the same characteristics.

In these circumstances I think the case falls within rule B stated by Mr. Jarman in the passage read from p. 1224 of his book and applied in the case of *Maclaren* v. *Stainton* (2), and must be treated as income, and in so far as it was distributed during the life of the tenant for life, constitutes income receivable by her under the trusts of the will.

Solicitors for plaintiffs: *Gamlen, Bowerman & Forward, for Arthur Mountain, Sedbergh.*

Solicitors for defendants: *Williamson, Hill & Co., for Bates, Mountain & West, Grimsby; Tarry, Sherlock & King.*

(1) 12 App. Cas. 385, 399. (2) 3 D. F. & J. 202.

H. L. L.

In re GAUL AND HOULSTON'S CONTRACT.

C. A.
1928
CLAUSON J.
Jan. 11, 12, 19.
C. A.
June 6.

[1927. G. 1918.]

Law of Property—Joint Tenancy—Land subject to a Charge—Settled Land—"Not being settled land"—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *ss.* 1, *sub-s.* 1 (*v.*); 2—*Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *ss.* 36, 205, *sub-s.* 1 (*xxvi.*); 207 (*a*).

The Law of Property Act, 1925, s. 36, sub-s. 1, provides: "Where a legal estate (not being settled land) is beneficially limited to or held in trust for any persons as joint tenants, the same shall be held on trust for sale, in like manner as if the persons beneficially entitled were tenants in common. . . . .":—

Held, that there was nothing in the context to give to the words "settled land" any other meaning than that given by s. 205, sub-s. 1 (xxvi.), which defines the words "unless the context otherwise requires" as having the same meaning as in the Settled Land Act, 1925.

Land was on December 31, 1925, held by two persons under a devise contained in a will made in 1888 as joint tenants in fee simple absolutely subject to a charge for 1000*l.* created in 1869 in consideration of marriage:—

Held, that the land was settled land within the meaning of the Settled Land Act, 1925, s. 1, sub-s. 1 (v.) and s. 2, and therefore that it was excepted from the application of the Law of Property Act, 1925, s. 36, sub-s. 1.

Decision of Clauson J. affirmed.

THIS was a purchaser's summons under s. 49 of the Law of Property Act, 1925, and it asked for a declaration that the vendors were not in a position to show a good title in themselves to sell the property agreed to be sold by a contract dated May 10, 1927.

By reason of a devise contained in the will of a testator who died in 1888, freehold property at Selattyn, Shropshire, belonged beneficially on December 31, 1925, to Frederick William Cory, a person of unsound mind not so found, and Jane Ann Cory as joint tenants in fee simple, subject only to a charge for 1000*l.* created in consideration of marriage by a lost deed of June 23, 1869. It was not known whether this was a mere equitable charge, or whether a legal estate was outstanding in the chargees by way of security for their charge. By a deed dated November 16, 1926, J. A. Cory purported to appoint the vendors to be trustees of the property

C. A. 1928

GAUL AND HOULSTON'S CONTRACT, *In re.*

for the purposes of the statutory trusts. This deed recited that the statutory trusts arose by the effect of the "transitional provisions for subjecting land, held in undivided shares, to trusts for sale." By a contract dated May 10, 1927, the applicant agreed to purchase and the respondents agreed to sell two houses known as the Corner House and Brook Cottage, forming part of the Selattyn estate. It was a term of the contract that a recital contained in a deed of even date with the charge for 1000*l.* should be accepted as conclusive evidence of the contents of that charge. That recital showed that the property to be charged was conveyed to the chargees, "their executors administrators and assigns." The applicant objected to the respondents' title, and eventually took out this summons.

The summons was heard before Clauson J. on January 11, 1928.

Arnold Jolly for the applicant. The transitional provisions of the Law of Property Act, 1925, do not touch joint tenancies. There is no reference to the transitional provisions in s. 36, and that section cannot refer forward to s. 39, where transitional provisions are first referred to. There is no trust for sale here apart from the statute; then if the land is excepted from s. 36 as being settled land there can be no trust for sale. This case is not affected by *In re Leigh's Settled Estates* (*No.* 1) (1) or *In re Parker's Settled Estates.* (2)

[He also cited *In re Bird* (3) and *In re Bird's Trusts.* (4)]

McMullan for the respondents. The respondents rely on s. 36 of the Law of Property Act, 1925. That section turned every joint tenancy existing immediately before January 1, 1926, into a legal joint tenancy subject to a trust for sale. That is the only section dealing with joint tenancies, past or future. Its effect is to cause the joint tenants to hold on the statutory trusts and to enable them to sell under the statutory trusts. The vendors were appointed trustees in their place and can therefore make a good title.

(1) [1926] Ch. 852.
(2) Since reported ante, p. 247.
(3) [1927] 1 Ch. 210.
(4) (1876) 3 Ch. D. 214.

Jolly in reply. Sect. 36 has no application, as the land is settled land within the meaning of the Settled Land Act, 1925.

Cur. adv. vult.

Jan. 19. CLAUSON J. It is not known whether the 1000*l.* charge was a mere equitable charge, or whether a legal estate was outstanding in the chargees by way of security for their charge. If no such legal estate was outstanding, F. W. Cory and J. A. Cory were, on December 31, 1925, not only joint tenants in fee beneficially, but also at law. If such legal estate was outstanding the effect of the Law of Property Act, 1925, Sch. I., Part VII., para. 3, was, as I understand, that on January 1, 1926, the fee simple vested at law in F. W. Cory and J. A. Cory as joint tenants, subject to a term of years to secure the 1000*l.* charge.

The property was affected in another way on the coming into force of the Settled Land Act and the Law of Property Act, 1925. By virtue of s. 1, sub-s. 1 (v.), and s. 2 of the Settled Land Act, 1925, the land became settled land by reason of the existence of the 1000*l.* charge. It is true that by sub-s. 7 of s. 1, introduced by the Schedule to the Law of Property (Amendment) Act, 1926, that section does not apply to land held upon trust for sale, but so far as I can see the land in question was not, prior to January 1, 1926, the subject-matter of a trust for sale; nor can I so far find that any trust for sale was imposed upon it by the Law of Property Act which came into force on that date.

If I am right so far, it would seem that a title could be made to this land (apart from the fact that F. W. Cory happens to be a person of unsound mind not so found) in either of two ways. Either F. W. Cory and J. A. Cory could sell under the Settled Land Act, 1925, s. 20, sub-s. 1 (ix.), as quasi tenants for life overriding, by the exercise of their powers, the 1000*l.* charge, subject, it may be, to trustees for Settled Land Act purposes being appointed and to the execution of a vesting deed or the obtaining of a vesting order; or, as an alternative, F. W. Cory and J. A. Cory

C. A. 1928

GAUL AND HOULSTON'S CONTRACT, *In re.*

Clauson J.

might be in a position to convey, subject to the 1000*l.* charge, by virtue of s. 1 of the Law of Property (Amendment) Act, 1926, and to obtain the concurrence of the chargees so as to enable the purchaser then to get a title free from the charge.

However, the owners of the land seem to have assumed that the effect of the various Acts which came into force on January 1, 1926, was that the land became vested in F. W. Cory and J. A. Cory as joint tenants on statutory trusts for sale. The matter was somewhat complicated by the fact, to which I have already referred, that F. W. Cory was a person of unsound mind not so found; but on the assumption I have mentioned, steps which I will assume to have been the proper steps, if F. W. Cory and J. A. Cory were trustees for sale, were taken to vest the land in the present respondents, the proposed vendors as trustees in place of F. W. Cory and J. A. Cory. Unless F. W. Cory and J. A. Cory became on January 1, 1926, trustees for sale the steps so taken were of course erroneous, and the respondents have no power to sell the property.

I do not know whether the difficulty has arisen from some confusion in the minds of those concerned between joint ownership and ownership in undivided shares which are of course (as indeed appears with the utmost plainness on the face of the Acts) quite different things; but before me the argument for the proposed vendors was that s. 36 of the Law of Property Act, 1925, turns every joint tenancy existing as a joint tenancy both at law and in equity immediately before January 1, 1926, into a legal joint tenancy upon trust for sale. That no doubt is so unless the words of exception apply; but it is not so if the legal estate in question is, in the words of the exception, settled land. The vendors contend that the exception can be paraphrased thus: "Unless the legal estate being one which came into existence before January 1, 1926, was up to January 1, 1926, settled land within the meaning of the old Settled Land Acts or being a legal estate which came into existence on or after January 1, 1926, is settled land within the meaning of the Settled Land Act, 1925." I cannot believe that this is the correct or

indeed a possible construction of the section. In my view the section is reasonably plain and may be paraphrased as follows: "Where at any particular moment after the coming into force of this Act, that is, after December 31, 1925, a legal estate stands beneficially limited to two persons as joint tenants, but is not at that moment settled land, the legal estate is held on trust for sale." At every moment of time after December 31, 1925, the land here in question was settled land by reason of the operation upon it of s. 1, sub-s. 1 (v.), and s. 2 of the Act of 1925, and it appears to me to follow that accordingly the land was and is within the exception, and was not and is not by s. 36 subjected to a trust for sale.

I reserved judgment because I wanted to consider whether there is anything either in the judgment of the Appeal Court in *In re Ryder & Steadman's Contract* (1) or in a recent judgment, at present unreported, of Romer J. in *In re Parker's Settled Estates* (2) which entitles or binds me to take any different view of the construction of the section. I have had the advantage of being furnished by the kindness of the reporter with a copy of Romer J.'s judgment. I cannot find anything in those judgments which seems to me inconsistent with the view of the construction of this section which I have expressed. I may observe that the moment of time to which the provisions in para. 1 of Part IV. of Sch. I. of the Law of Property Act, 1925, relate is the moment immediately before the commencement of the Act, and that accordingly, as the Appeal Court pointed out in *In re Ryder & Steadman's Contract* (1), the expression "settled land" in that clause must be construed as of that date. Sect. 36 applies, as I read it, necessarily to a period after the coming into force of the Act, that is, to a period after December 31, 1925, and accordingly there is no context to interfere with the meaning given to the expression "settled land" by s. 205 sub-s. 1 (xxvi.), of the Law of Property Act, 1925—namely, "settled land" within the meaning of the Settled Land Act, 1925.

(1) [1927] 2 Ch. 62. (2) Since reported ante, p. 247.

C. A. 1928

GAUL AND HOULSTON'S CONTRACT, *In re.*

Clauson J.

From the view I take of the construction of this section it appears to me to follow that the respondents to the summons cannot make out a good title to the property, and I propose, subject to anything counsel may wish to say, to declare that a good title to the property has not been shown, and to make an order for the return of the deposit with interest at 5 per cent., and for payment by the respondents of the costs of investigating the title and of the summons.

P. J. B.

C. A.

The vendors appealed. The appeal was heard on June 6, 1928.

Topham K.C. and *McMullan* for the appellants. Sect. 36 of the Law of Property Act, 1925, became applicable on January 1, 1926, so as to cause the two Corys, who immediately before the Act held as joint tenants in fee simple subject only to the mortgage for 1000*l.*, to hold as trustees upon trust for sale "in like manner as if the persons beneficially entitled were tenants in common."

[LAWRENCE L.J. Sect. 36 deals with legal estates. Was not the legal estate in fee simple outstanding in the mortgagees immediately before the Act came into force?]

As the mortgage deed was lost, it was made a term of the contract of sale that the purchaser should accept a recital of its effect in a later deed. That recital stated that the property was conveyed to the mortgagees, "their executors administrators and assigns." It follows that it has to be assumed for the purpose of the sale that the legal estate in fee simple was never vested in the mortgagees but remained in the mortgagor.

Sect. 36 applies both to joint tenancies in existence when the Law of Property Act came into force and to subsequent joint tenancies: see s. 207 (*a*). In the former case its effect is to bring in the transitional provisions in Sch. I., Part IV. The result is that where persons were beneficially entitled as joint tenants before that Act came into force, they held under the Act on the statutory trusts just as if they had been tenants in common. Clauson J. has held that by reason of

the charge to secure 1000*l.* then in existence the land became settled land under s. 1, sub-s. 1 (v.), and s. 2. But in *In re Ryder & Steadman's Contract* (1) the Court of Appeal decided that in Sch. I., Part IV., para. 1 (2.), the words "not being settled land" meant not being settled land under the law in existence before 1926. The same construction ought to be given to the words "(not being settled land)" in s. 36, sub-s. 1, seeing that the effect of s. 36, sub-s. 1, is to make Sch. I., Part IV., applicable to joint tenants.

[LAWRENCE L.J. Your difficulty is that s. 36, sub-s. 1, deals with the position when the Law of Property Act, 1925, has come into force, whereas in Sch. I., Part IV., the relevant position is that "immediately before the commencement of this Act."]

In *In re Ryder & Steadman's Contract* (2) Sargant L.J. pointed out that as the earlier part of the paragraph dealt with the position anterior to the Act, it would be giving a mongrel definition if it was said that the words "not being settled land," were to be treated as referring to the new law. So here as the effect of s. 36, sub-s. 1, is to make Sch. I., Part IV., apply to joint tenancies, the words "(not being settled land)" must be given the same meaning in s. 36, sub-s. 1, to avoid what Sargant L.J. called a mongrel definition. Clauson J. has started at the wrong end by referring first to the Settled Land Act. He should have applied the Law of Property Act, 1925, s. 36, first and then as that creates a trust for sale, the application of the Settled Land Act, 1925, would be excluded by s. 1, sub-s. 7, of that Act.

[RUSSELL L.J. In Sch. I., Part IV., para. 1, there was a context to make the definition of settled land in s. 205, sub-s. 1 (xxvi.), giving it the same meaning as in the Settled Land Act, 1925, inapplicable.]

In s. 36, sub-s. 1, "is" is ambiguous and the period it refers to is made clear by the later part of the sub-section, which makes Sch. I., Part IV., applicable.

Jolly for the respondent. It has been admitted that s. 36 is not merely a transitional provision. If not, then it is

(1) [1927] 2 Ch. 62. (2) [1927] 2 Ch. 62, 80.

C. A. 1928

GAUL AND HOULSTON'S CONTRACT, *In re.*

impossible to adopt any meaning for "settled land" other than that given by s. 205, sub-s. 1 (xxvi.). It is clear that this must be its meaning when s. 36 applies to joint tenancies coming into existence after the Act; and, if so, to give "settled land" a different meaning when applied to prior joint tenancies would indeed be to have a "mongrel definition." Sch. I., Part II., para. 6 (*c*), shows that by "settled land" is meant settled land within the meaning of the Settled Land Act, 1925. If so, s. 36 has no application, as the property became settled land under the Settled Land Act, 1925, s. 1, sub-s. 1 (v.), and s. 2. Further, s. 36, sub-s. 1, does not make Sch. I., Part IV., applicable. Sect. 36 is not a divesting section but merely declares that the legal estate is to be held on trust for sale. The persons in whom it was vested were so to hold it and the words in s. 36, sub-s. 1, "in like manner as if the persons beneficially entitled were tenants in common," do not refer to Sch. I., Part IV., but to s. 34, sub-s. 2. There is therefore no context to enable the words "(not being settled land)" to be given any other meaning than that stated in s. 205, sub-s. 1 (xxvi.).

Topham K.C. in reply. The important test in this case is whether Sch. I., Part IV., applies. Having regard to the application given to s. 36, sub-s. 1, by s. 207 (*a*), it clearly must.

LORD HANWORTH M.R. We have to thank counsel on both sides for assisting us in arriving at a conclusion in this case. The question that we have to decide is a narrow one —namely, what is the effect and meaning of s. 36 of the Law of Property Act, 1925. Clauson J. has stated the facts, and the way in which the problem arises; and I agree with the judgment he has delivered, and the reasoning on which it is based. The question is whether s. 36 applied in the present case so as to enable the vendors to make a good title on a sale to their purchaser. Sect. 36, sub-s. 1, opens with the words: "Where a legal estate (not being settled land) is beneficially limited to or held in trust for any persons as joint tenants, the same shall be held on trust for sale." I

need not read any more, because I think those are the operative words of the section; but at the outset an exception from the operation of the sub-section is effected by the words in brackets, "(not being settled land)." When therefore it is suggested that s. 36, sub-s. 1, is applicable, it becomes at once necessary to ascertain whether the land in question is or is not settled land. The definition of "settled land" is contained in s. 205, and, by sub-s. 1 (xxvi.), of that section "settled land" has the same meaning as in the Settled Land Act, 1925. The Settled Land Act, 1925, provides by s. 2: "Land which is or is deemed to be the subject of a settlement is for the purposes of this Act settled land, and is in relation to the settlement referred to in this Act as the settled land." And by s. 1, sub-s. 1 (v.), any instrument or instruments under which after the commencement of the Act land stands for the time being "charged, whether voluntarily or in consideration of marriage or by way of family arrangement, and whether immediately or after an interval, with the payment of any rentcharge for the life of any person, or any less period, or of any capital, annual, or periodical sums for the portions, advancement, maintenance, or otherwise for the benefit of any persons, with or without any term of years for securing or raising the same, ... creates or is for the purposes of this Act a settlement and is in this Act referred to as a settlement, or as the settlement, as the case requires." If the definition in s. 205, sub-s. 1 (xxvi.), is applied, Mr. Topham is compelled to admit that the land here in question is settled land. I do not put the responsibility of that upon him, but on the facts, which are not in question, it appears that if the definition of settled land in s. 205 of the Law of Property Act, which brings in by reference the other sections I have read, is applied, then the land in question here is settled land. That being so, I think the argument of Mr. Jolly that s. 36 does not apply, which was the view accepted by Clauson J., stands good. It is at an early point in s. 36, sub-s. 1, indicated that the sub-section does not apply to settled land, and the expression "settled land" has been interpreted and in that sense identified by s. 205

C. A. 1928

GAUL AND HOULSTON'S CONTRACT, *In re.*

Lord Hanworth M.R.

of the same Act. Clauson J. has said that " section 36 applies, as I read it, necessarily to a period after the coming into force of the Act, that is, to a period after December 31, 1925, and accordingly there is no context to interfere with the meaning given to the expression ' settled land ' by section 205, sub-section 1 (xxvi.), of the Law of Property Act, 1925." I agree with that view. It appears to me that the operation of s. 36 begins from January 1, 1926. It is at that time that a meaning has to be given to the exception " not being settled land." I cannot think that one is entitled to go behind the date at which s. 36 came into operation in order to find a definition of settled land.

The argument presented to us as an alternative to that view is that s. 36, sub-s. 1, provides that in certain circumstances the legal estate shall be held on trust for sale " in like manner as if the persons beneficially entitled were tenants in common," and that as the particular trust for sale which is indicated by these words in a case when the joint tenancy was already in existence before the Law of Property Act, 1925, came into force, has to be a trust for effecting a transition from the old law to the new law, it becomes necessary to look at s. 39, which refers to certain transitional provisions. If then regard may be had to the transitional provisions, s. 39, sub-s. 4, makes Sch. I., Part IV., applicable, and there a distinction is drawn between the law as it applied before the commencement of the Act and the law afterwards. And it is argued that in this way it becomes necessary to apply the interpretation which we gave in *In re Ryder & Steadman's Contract* (1) to the words " (not being settled land)." That argument is very attractive from many points of view, and it may be that it may afford a solution of many of the difficulties that may arise; but in construing the Law of Property Act, I for my part, am not prepared to go beyond the point which is necessarily involved by the case before me. I see so many difficulties which may arise that I think the wisest course is to limit myself to dealing with the point that actually needs to be decided. Ultimately no doubt a

(1) [1927] 2 Ch. 62.

solution to many of the problems that are at present remote will be obtained, but for the present purpose it appears to me unnecessary to say more than that I agree with Clauson J.'s judgment, and hold that the exception "(not being settled land)" in s. 36, sub-s. 1, is sufficient, and no doubt is intended by virtue of the definition section, to exclude the land which is the subject-matter of this contract. For this reason it appears to me that the appeal must be dismissed.

I will only add one word more. I feel the greatest hesitation and difficulty in taking some words which it was suggested might be made available from s. 207 and applying them to the body of the Act. Those words which are to be found in s. 207 towards the end of sub-clause (*a*) are as follows: "But, subject as aforesaid, this Act shall, except where otherwise expressly provided, apply to and in respect of instruments whether made or coming into operation before or after such commencement." My own instinct at the present moment is to say that those words must be read in their context, which relates to repeals and the preservation of certain rights, privileges and liabilities, saved by the proviso, which also keeps alive s. 38 of the Interpretation Act, 1889. For my part I feel it is very difficult to take those words from that repeal section and use them for the interpretation of a section in the general body of the Act.

LAWRENCE L.J. I agree. The point to be decided in this case is what is the true meaning of the words "settled land" in s. 36, sub-s. 1, of the Law of Property Act, 1925. At the date of the passing of that Act the land in question was vested in joint tenants subject to an overriding charge or mortgage, and it is assumed for the purposes of this case that the legal estate was then vested in the persons who owned the equity of redemption. The argument in support of the vendors' contention is that the words "settled land" in s. 36, sub-s. 1, have reference to the state of facts existing immediately before the Act was passed. Mr. Topham, whilst denying that the words in question apply to the state of facts brought about by the passing of the Act, was constrained to admit

C. A. 1928

GAUL AND HOULSTON'S CONTRACT, *In re.*

Lawrence L.J.

that s. 36 was not merely a transitional section and that it operated both upon land which was held in joint tenancy at the date of the passing of the Act, and upon land which came under its provisions by reason of a disposition made after the Act.

The real question is whether the definition of "settled land" contained in s. 205, sub-s. 1 (xxvi.), applies, or whether the context in which these words are found in s. 36, requires that some different meaning should be given to them. Sect. 205, sub-s. 1, commences with the provision that "in this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say." The meaning assigned to the expression "settled land" is contained in clause xxvi., which defines it by reference to the Settled Land Act, 1925. The result is that the Act must be read as if ss. 1 and 2 of the Settled Land Act, 1925, had been put into it in extenso.

Then is there anything in the context in s. 36 which requires the words "settled land" in that section to have any other meaning than that assigned to them by s. 205, sub-s. 1, of the Act? In my judgment there is not. The words can be given effect to sensibly and properly, if interpreted as defined by the Act. In *In re Ryder & Steadman's Contract* (1), on the contrary, the context required the words "settled land" to have a meaning different to that assigned to them by the Act. But that was so because Part IV. of the First Schedule, which contains purely transitional provisions with respect to land held by tenants in common, expressly deals with the state of things which existed immediately before the passing of the Act; and, as was pointed out by Sargant L.J. in that case, to have held there that the expression "settled land" took its meaning from the Settled Land Act, 1925, would result in a kind of mongrel definition, and would be inconsistent with the meaning which para. 1 of Part IV. was obviously intended to bear in view of its transitional nature. There is no such context to be found in s. 36. It is a plain case where an expression has been used to which

(1) [1927] 2 Ch. 62.

the Act has assigned a definite meaning, and I agree with Clauson J. in thinking that as the land in question from the moment when the Act came into force was settled land it came within the exception contained in s. 36, with the result that the section does not apply to it. In my opinion the appeal fails and should be dismissed.

RUSSELL L.J. At the relevant point of time—namely, the opening of January 1, 1926, this land was vested in fee in two persons of the name of Cory as joint tenants subject to a charge for 1000*l.*, and the question is whether in those circumstances the case falls or does not fall within s. 36 of the Law of Property Act, 1925.

In order to bring the land within that section it must be shown that it was not, when the Law of Property Act, 1925, commenced to operate, settled land within the meaning of that Act. The meaning of "settled land" in the Act is stated in s. 205, sub-s. 1 (xxvi.), to be the same as in the Settled Land Act, 1925. That involves a reference to s. 2 of the Settled Land Act. Sect. 2 of that Act says that "Land which is or is deemed to be the subject of a settlement is for the purposes of this Act settled land, and is in relation to the settlement referred to in this Act as the settled land." For the purpose of ascertaining what is the settlement you look at s. 1, and that includes the case where the land is "charged, whether voluntarily or in consideration of marriage . . . . with the payment . . . . of any capital sum." Therefore the position is that at the date when the Law of Property Act, 1925, commenced to operate, this land was settled land within the meaning of that Act. The question here is as to the true construction of s. 36, and in his judgment Clauson J. uses this language: "In my view the section is reasonably plain and may be paraphrased as follows: 'Where at any particular moment after the coming into force of this Act, that is, after December 31, 1925, a legal estate stands beneficially limited to two persons as joint tenants, but is not at that moment settled land the legal estate is held on trust for sale.'" Then the learned judge continues: "At

C. A. 1928

GAUL AND HOULSTON'S CONTRACT, *In re.*

Russell L.J.

every moment of time after December 31, 1925, the land here in question was settled land by reason of the operation upon it of s. 1, sub-s. 1 (v.), and s. 2 of the Act of 1925 "—meaning thereby the Settled Land Act of that date—" and it appears to me to follow that accordingly the land was and is within the exception, and was not and is not by s. 36 subjected to a trust for sale." With every word of that I agree. The whole case turns upon the question whether " settled land " in that section means " settled land " under the old law or under the new law, and in my opinion, there being no context to justify the view that it means settled land under the old law, the natural meaning of the section must prevail, and the matter must be judged by reference to the point of time at which the section in question is in fact operating. I agree that the appeal should be dismissed.

Solicitors for the appellants: *Johnson, Peacock, Hepworth & Chowne, for Bennitt & Grazebrook, Birmingham.*

Solicitors for the respondent: *Milner & Bickford, for E. Wynn Edwards, Oswestry.*

H. C. G.

In re BOULTON'S SETTLEMENT TRUST.

STEWART *v.* BOULTON.

EVE J.
1928
May 22.

[1928. B. 699.

Power of Appointment—Exercise by Will—Gift to Object of Power upon "protective trusts"—Incorporation of statutory Clause—Validity—Excessive Execution—Delegation—Perpetuity—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 33.

A testator, in exercise of a power of appointment among children and issue contained in his marriage settlement, by his will bequeathed specific property to his son W., and directed his trustees to hold the income of the remainder of the trust property upon protective trusts for the benefit of his son O., and subject thereto to hold the remainder of such property in trust for his granddaughter M. :—

Held, that as the appointment upon "protective trusts," as defined by s. 33 of the Trustee Act, 1925, gave a discretion to the trustees to apply the income in the event of a forfeiture for the benefit either of O. or of his wife or children, it was to that extent void, both as being a delegation of the power and in excess of it. The clause contained in s. 33, sub-s. 1 (ii.), of the Trustee Act, 1925, must therefore be struck out of the will for all purposes. There was no interval of time, however, during which the income of the appointed fund was undisposed of, but there was a valid appointment to O. for life or until an event should happen depriving him of the right to receive the income, and subject thereto for the granddaughter M. absolutely.

ORIGINATING SUMMONS.

Under a marriage settlement dated September 2, 1884, and made between Godfrey Boulton of the first part, Zilia Annie Barker of the second part, and James Boulton, Edward Stewart and Alfred Boulton of the third part (being the settlement made upon the marriage of Godfrey Boulton with his first wife Zilia Annie Barker), certain reversionary shares in freehold and leasehold hereditaments and other personal estate were assured to trustees upon certain trusts during the lives of the spouses and after the death of the survivor of them in trust for all or any of the children or remoter issue of Godfrey Boulton as the survivor of them Godfrey Boulton and Zilia Annie Barker should by deed or will or codicil appoint, and in default of appointment in trust for the children who

EVE J.
1928
BOULTON'S SETTLEMENT TRUST, *In re.* STEWART *v.* BOULTON.

should attain twenty-one or marry of Godfrey Boulton by his then or any subsequent wife.

There were two children only of the marriage, Norman Boulton, who died in infancy, and the defendant Ormonde Boulton. Zilia Annie Boulton died on March 13, 1893. The testator remarried in 1898 and there were two children of his second marriage, the defendants Wilfred Boulton and Humphry Boulton.

By his will dated October 24, 1927, Godfrey Boulton in exercise of the power of appointment conferred upon him by the above settlement, bequeathed certain leasehold shops in London to his son Wilfred, and subject thereto directed his trustees to hold the income of the remainder of the trust property upon protective trusts for the benefit of his son Ormonde without impeachment of waste, and subject thereto to hold the remainder of the trust property upon trust for his granddaughter Margaret Elizabeth Davies Boulton, the daughter of Ormonde Boulton.

The testator died on November 1, 1927, and his will was proved by the executors therein named on January 9, 1928.

The summons asked for the determination of the questions (1.) whether the above appointment was valid as to (*a*) the interest appointed to the defendant Ormonde Boulton, (*b*) the interest appointed to the defendant Margaret Elizabeth Davies Boulton, or whether such appointment as regards both or either of such interests was invalid and void by reason of the rule against perpetuities or for any other reason, and (2.) if it should be held that the appointment to Ormonde Boulton was invalid and the appointment to Margaret valid, whether the interest so validly appointed took effect at once or whether during the life of Ormonde Boulton the income was not effectually appointed and went in default of appointment.

By the Trustee Act, 1925, s. 33: "(1.) Where any income, including an annuity or other periodical payment, is directed to be held on protective trusts for the benefit of any person (in this section called 'the principal beneficiary') for the period of his life or any less period, then, during that period (in this section called 'the trust period') the said income shall,

without prejudice to any prior interest, be held on the following trusts, namely:—

(i.) Upon trust for the principal beneficiary during the trust period or until he, whether before or after the termination of any prior interest, does or attempts to do or suffers any act or thing, or until any event happens, other than an advance under any statutory or express power, whereby, if the said income were payable during the trust period to the principal beneficiary absolutely during that period, he would be deprived of the right to receive the same or any part thereof, in any of which cases, as well as on the termination of the trust period, whichever first happens, this trust of the said income shall fail or determine;

(ii.) If the trust aforesaid fails or determines during the subsistence of the trust period, then, during the residue of that period, the said income shall be held upon trust for the application thereof for the maintenance or support, or otherwise for the benefit, of all or any one or more exclusively of the other or others of the following persons (that is to say)—

(*a*) the principal beneficiary and his or her wife or husband, if any, and his or her children or more remote issue, if any; or

(*b*) if there is no wife or husband or issue of the principal beneficiary in existence, the principal beneficiary and the persons who would, if he were actually dead, be entitled to the trust property or the income thereof or to the annuity fund, if any, or arrears of the annuity, as the case may be;

as the trustees in their absolute discretion, without being liable to account for the exercise of such discretion, think fit.

(2.) This section does not apply to trusts coming into operation before the commencement of this Act, and has effect subject to any variation of the implied trusts aforesaid contained in the instrument creating the trust.

(3.) Nothing in this section operates to validate any trust which would, if contained in the instrument creating the trust, be liable to be set aside."

EVE J.
1928
BOULTON'S SETTLEMENT TRUST, *In re.*
STEWART *v.* BOULTON.

E. M. Winterbotham for the plaintiffs.

W. M. Hunt for the defendants Wilfred and Humphry Boulton. The trust in favour of Ormonde Boulton is void for several reasons. The appointment being upon protective trusts, as defined in s. 33 of the Trustee Act, 1925, the trustees are to pay the income to the tenant for life until he commits an act of forfeiture, and upon this happening to pay or apply the income either for his benefit, or that of his wife or children. But the wife and children are not objects of the power, and this is an excessive execution. Further, the right of selection of and distribution among the persons to receive is a delegation of the power to the trustees, and therefore void. Thirdly, it is void as creating a perpetuity. Ormonde Boulton was not born in 1884. A simple life interest, or one determinable on the happening of a certain event, e.g., entering a religious community, can be given to an unborn person: *Wainwright* v. *Miller*. (1) But if property is given until alienation, and then a remainder is given over, it creates a perpetuity: *In re Cunynghame's Settlement* (2), where an appointment was made to the separate use of a married daughter with a restraint upon anticipation, and the restraint was held void as a perpetuity. The whole gift to Ormonde into which s. 33 of the Trustee Act, 1925, must be read is bad, and therefore the subsequent expectant gift to the granddaughter is also void, and the property goes in default of appointment.

C. J. Farwell K.C. and *Alan Ellis* for the defendant Ormonde Boulton. The appointment, though made to one unborn at the date when the power was created, is valid. If an appointment to A. for life is valid, an appointment to him for a period which may be shorter than his life is equally valid. The critical date is when the appointment took effect; the date of the testator's death: *In re Brown's Trust* (3); Farwell on Powers, 3rd ed., p. 359. Here it is clear that the discretionary trust is void as being a delegation, and in excess of the power, then either the property goes to the granddaughter, or in default of appointment upon a forfeiture under the protective

(1) [1897] 2 Ch. 255. (2) (1871) L. R. 11 Eq. 324.
(3) (1865) L. R. 1 Eq. 74.

trusts: then in either case Ormonde and his daughter can put an end to the trusts as to the share passing to her in default of appointment. There is no postponement of vesting: the property vested immediately on the death of the testator. Assuming the ultimate trust to the granddaughter to be good, there can be no objection to the appointment, as it must vest within the perpetuity limits.

C. Stafford Crossman for the defendant Margaret Boulton. The appointment to Margaret is good; she takes subject to a determinable life interest appointed to her father. The words "during the trust period or until" in s. 33 create one trust and define a period. The fact that the trust might determine outside the period makes no difference; the remoteness, if any, is in the creation, not in the duration of the limitations: *In re Cassel.* (1) The second sub-paragraph of sub-s. 1 of s. 33 brings in a trust which can only take effect in the possible event of a forfeiture. The delegation of the power by the testator cuts this clause out of the will. But though the insertion of a delegation cuts sub-clause 2 out of the will, it does not affect the validity of the rest. As the wife of Ormonde could not be an object of the power, it is an excessive execution to incorporate protective trusts: *Williamson* v. *Farwell.* (2) But the insertion of a delegation which can be cut out of the will does not affect the gift to the granddaughter, which is accelerated. There is no interval of time during which the income is undisposed of and goes in default of appointment.

Hunt in reply.

EVE J. Under the provisions of his marriage settlement dated September 2, 1884, the late Mr. Godfrey Boulton had power, after the decease of the survivor of himself and his wife, to appoint the trust premises and the income thereof to all or any his children or remoter issue by his then intended or any future wife in such shares and manner in all respects as he might see fit. In default of appointment the property was to go to his children, sons and daughters, by the then present or any future marriage. By para. 3 of his will he

(1) [1926] Ch. 358. (2) (1887) 35 Ch. D. 128.

EVE J.
1928
BOULTON'S SETTLEMENT TRUST, *In re.*
STEWART *v.* BOULTON.

purports to exercise the power, by directing that from and after his decease the trustees are to hold certain leasehold shops upon trust for his son Wilfred and the income of the remainder of the trust property upon protective trusts for the benefit of his son Ormonde " without impeachment of waste " —I cannot see what these words mean—during his life, and subject thereto are to hold the remainder of the trust property in trust for his granddaughter Margaret Elizabeth Davies Boulton.

The questions are: whether the appointment in favour of Ormonde is valid; whether the appointment in favour of the granddaughter is good or bad; and further whether, even supposing both should be good, there is an interval during which the income at any rate has to be dealt with as in default of appointment. In order to ascertain what the nature of the appointment in favour of Ormonde is, one must refer to s. 33 of the Trustee Act, 1925, which enacts that " where any income . . . . is directed to be held on protective trusts for the benefit of any person (in this section called 'the principal beneficiary') for the period of his life or any less period, then, during that period (in this section called 'the trust period') the said income shall, without prejudice to any prior interest, be held on the following trusts " ; upon trust for the principal beneficiary during the trust period or until he does or attempts to do or suffers any act or thing or until any event whereby if the said income were payable during the trust period to the principal beneficiary absolutely during that period, he would be deprived of the right to receive the same or any part thereof. Pausing there, I cannot see anything inconsistent with the due exercise of the power so far—a power to appoint a life interest must, I think, include a power to appoint an interest which may determine on the happening of some earlier event than death. The section goes on to provide that if the aforesaid trust fails or determines during the trust period, then, during the residue of that period the said income shall be held upon trust for the application thereof, as the trustees in their absolute discretion think fit, for the maintenance or support or otherwise for the benefit of the principal beneficiary and his

or her wife or husband, if any, and his or her children or more remote issue, if any, or if there is no wife or husband or issue of the principal beneficiary in existence, the principal beneficiary and the persons who would, if he were actually dead, be entitled to the trust property or the income thereof.

Two objections were raised in this case under this part of the section, the one that the discretionary trust includes individuals—or an individual—the wife—who is not an object of the power; and the other that it operates as a delegation to the trustees of the donee's discretion as to selection and distribution. I think these objections are fatal and that the will must be construed on the footing that the appointment of the income was limited to the trusts declared in s. 33, sub-s. 1 (i.), of the Trustee Act. Then follows the appointment to the granddaughter. I do not think that presents much difficulty. Subject to the elimination of the invalid part of the appointment introduced by the use of the expression "protective trusts," the limitations are for the son for his lifetime or until the happening of some event whereby he shall be deprived of the right to enjoy it; then the fund is appointed to the granddaughter, and on the authorities it appears to be quite clear that there is nothing to prevent the subsequent limitation, which is made in due exercise of the power, from coming into effect, notwithstanding the interposition between the good appointment to the son and the ultimate appointment to his daughter of an invalid attempt to appoint in excess of the power.

The question remains whether, in the event of Ormonde's interest determining in his lifetime, the income for the interval between such determination and his death must be dealt with as an unappointed part of the fund. I think not. The interest of the granddaughter is subject to the protective trusts, and this must, I think, mean the protective trusts capable of taking effect, and when none of the trusts declared of the income during the interval are capable of taking effect, I think that the only result of the determination of the son's interest in his lifetime is to accelerate the enjoyment of the remainder by the granddaughter.

EVE J.
1928
BOULTON'S SETTLEMENT TRUST, *In re.*
STEWART *v.* BOULTON.

There must be a declaration that the appointment made by clause 3 of the will of Godfrey Boulton under the power contained in the said settlement is valid as to the interest appointed to the defendant Ormonde Boulton, during his lifetime or until forfeiture, and that the interest appointed to the defendant Margaret Elizabeth Davies Boulton takes effect at once upon the death or forfeiture of his interest by Ormonde Boulton, with costs of all parties as between solicitor and client out of the settlement fund.

Solicitors: *Boulton, Sons & Sandeman; Holt Beever & Co.; Gibson & Weldon, for Trevor C. Griffiths, Blackwood, Mon.*

H. L. L.

EVE J.
1928
May 23.

In re CALOW.

CALOW *v.* CALOW.

[1928. C. 433.]

Will—Specific Devise—Conversion—Contract for Sale of Part of Land devised before Will made—Completion of Purchase after Testator's Death—Title to Proceeds of Sale—Whether passing under specific Devise or residuary Gift.

A testator by his will made in 1925 devised all his freehold property situate at D. to trustees upon trust to hold the same or the proceeds of sale thereof for his two sons named as joint tenants, and gave and bequeathed his residuary real and personal estate to other persons. The testator possessed at the date of his will an undivided moiety in some 37 acres of freehold land at D., 10½ acres of which he had, in 1921, contracted to sell. He died in July, 1925, before the purchase had been completed, and owing to difficulties of title completion did not take place until December, 1925:—

Held, that the will having been made after the date of the contract for sale, and with full knowledge of that contract, indicated an intention, as shown by the reference to proceeds of sale, to pass whatever estate the testator had in the property, though it was only part of his freehold land at D., to the specific devisees.

Weeding v. *Weeding* (1861) 1 J. & H. 424 and *Drant* v. *Vause* (1842) 1 Y. & C. Ch. 580 followed and applied.

ORIGINATING SUMMONS.

The testator, John Robert Calow, by his will dated March 10, 1925, after appointing executors and trustees thereof, and

making certain specific and pecuniary bequests, devised all his freehold property situate at Dagenham, Essex, to his sons, Alfred John Calow and Herbert William Calow, in equal shares as joint tenants, but directed his trustees to retain the interest therein of H. W. Calow should he succeed thereto by survivorship "upon trust to sell or to retain the same at their absolute discretion and to receive the income to arise therefrom or from any investments for the time being representing the same or the proceeds of sale thereof and pay such income to his said son during his life and after his death to hold the same or the proceeds of sale in trust for the said A. J. Calow and his heirs absolutely." The testator devised and bequeathed all his real and personal estate not thereby otherwise disposed of to his trustees upon trust for sale and conversion and investment and to pay the income thereof to his wife during her life or until she should remarry, and subject thereto upon trust to divide the capital among his five children named in varying shares.

The testator died on July 26, 1925, and his will was duly proved on November 24, 1925, by the executors.

The testator was beneficially entitled at the date of his will to one moiety of certain freehold lands and hereditaments at Dagenham, Essex, amounting to 37 acres altogether, but by an agreement for sale dated August 1, 1921, had contracted to sell a portion, amounting to some $10\frac{1}{2}$ acres thereof, to the London County Council, who were purchasing the same for housing purposes under the Lands Clauses Consolidation Act, 1845. The Council were to be at liberty to enter into possession of the property at any time thereafter subject to the rights of the testator and the tenant, such entry not to be an acceptance of title, but owing to difficulties of title the purchase was not in fact completed and possession taken by the Council until after his death. The conveyance by the parties interested to the Council was dated December 31, 1925. The conveyance was in fact executed by the testator in or about June, 1925, but not as an escrow, and was confirmed by a deed of confirmation executed by the

EVE J.
1928
CALOW, *In re.* CALOW *v.* CALOW.

personal representatives indorsed thereon on the same date, December 31, 1925.

The summons raised the question whether the interest of the testator in the piece of land contracted to be sold to the County Council and the proceeds of sale thereof passed under the devise of the testator's freehold property at Dagenham, or formed part of the testator's residuary estate.

E. Rivière for the plaintiffs.

Overton for the specific devisees. There was no ademption or conversion as between the date of the testator's will and the date of his death. The question is what he intended. His intention was that his son, Alfred John Calow, should, if he survived his brother, take the whole of the Dagenham property in whatever form it should then be. The words "or the proceeds of sale thereof" include the proceeds of sale of the land the testator had contracted to sell.

The general rule is that where in a will made after a contract for sale, the testator knowing of the contract devises the specific property the subject of the contract, a part of which is to be sold, that is a sufficient indication of an intention to pass to the devisee the whole of the testator's interest in the property: *Emuss* v. *Smith* (1); *Drant* v. *Vause* (2); *In re Pyle*. (3) In the latter case Stirling J. said the general principle was settled by *Lawes* v. *Bennett* (4) that where an option of purchase was exercised after the testator's death, in the absence of any indication in his will to the contrary, the proceeds of sale would pass as personalty, not as realty. The rule in *Lawes* v. *Bennett* (4) only applies to a general devise, and there is here sufficient evidence of an intention to exclude it: *Gilfoyle* v. *Wood-Martin*. (5)

H. B. Braund for the residuary legatees. The contract effected a conversion, and therefore prima facie the property sold must be deemed to be personalty, and the specific gift must fail. If the Court can find a contrary intention in the will it will direct a reconversion.

(1) (1848) 2 De G. & Sm. 722.
(2) 1 Y. & C. Ch. 580.
(3) [1895] 1 Ch. 724.
(4) (1785) 1 Cox, 167.
(5) [1921] 1 I. R. 105.

[EVE J. In the Irish case, *Gilfoyle* v. *Wood-Martin* (1), the Master of the Rolls thought that a trust for sale could not be defeated by a previous sale by the testator, and there was no ademption. Did the testator himself deal with this property in his will as realty ?]

No, because he had other land at Dagenham to which the devise could and did apply. Here the testator has not devised the property by a specific description; it is a devise of all his land at Dagenham, and he had sold part of it. There is no indication of intention on this point in the will: *Weeding* v. *Weeding*. (2)

Overton in reply. In *Drant* v. *Vause* (3) the whole of the property was comprised in the option, but the exercise of it was only as to a part.

EVE J. At the date of his will made in 1925 the testator was possessed of a moiety of some 37 acres of land at Dagenham in Essex. There was then subsisting a contract for the sale of 10½ of the 37 acres to the London County Council, but the completion of that contract was delayed by reason of certain difficulties over the title, and as a matter of fact it was not completed until after the testator's death, although I may notice in passing that the testator did in fact execute the conveyance in his lifetime. By his will he gave and devised "all my freehold property situate at Dagenham, Essex, to my sons Alfred John Calow and Herbert William Calow in equal shares as joint tenants but I direct that my trustees shall retain the interest therein of my son Herbert William Calow should he succeed thereto by survivorship upon trust to sell the same or to retain the same at their absolute discretion and to receive the income to arise therefrom or from any investment or investments for the time being representing the same"—that must be the land—"or the proceeds of sale thereof and to pay such income to my said son during his life and after his death to hold the same or the proceeds of sale in trust for my son Alfred John Calow and his heirs absolutely." Later on he gave and bequeathed

(1) [1921] 1 I. R. 105. (2) 1 J. & H. 424.
(3) 1 Y. & C. Ch. 580.

EVE J.
1928
CALOW, *In re.* CALOW *v.* CALOW.

his residuary real and personal estate to other persons. The contract of 1921, followed by completion on December 31, 1925, operated as a complete conversion of the 10½ acres, and the question I have to decide is whether the proceeds of sale of those 10½ acres pass under the specific devise to the sons or whether they fall into residue. It is not suggested that, if in fact the 10½ acres, the subject of the sale, had represented the whole of the testator's land at Dagenham at the time of his will, the sons would not have been entitled to the sale moneys, but in this case there remains a moiety of 26½ acres of freehold property at Dagenham, and the case is not therefore one where a testator, having contracted to sell real estate before making his will, has with knowledge of the contract specifically devised the land so contracted to be sold and must in the circumstances be taken to have intended the devise to operate over the proceeds of the sale, but is the ordinary case of a testator, who having converted part only of the specific realty, may well have intended the remaining realty to pass under the specific devise, and the proceeds of that already converted to pass under the residuary bequest. The general rule is, I think, as stated by Mr. Overton. It is to be found in the judgment of Wood V.-C. in *Weeding* v. *Weeding* (1) and reproduced in that of Stirling J. in *In re Pyle* (2): "When you find, that, in a will made after a contract giving an option of purchase, the testator, knowing of the existence of the contract, devises the specific property which is the subject of the contract, without referring in any way to the contract he has entered into, there it is considered that there is sufficient indication of an intention to pass that property to give to the devisee all the interest, whatever it may be, that the testator had in it." Mr. Overton says that the rule has been applied where the testator has not limited the devise to the specific property the subject of the contract, and that seems to be the result of the decision in the case of *Drant* v. *Vause*. (3) In that case the testator had demised certain freehold property at Sculcoates in the

(1) 1 J. & H. 424, 431. (2) [1895] 1 Ch. 724, 727.
(3) 1 Y. & C. Ch. 580.

county of York to lessees for fourteen years, with a covenant therein that they should have the option at any time during the term of purchasing the property at the sum therein mentioned. He afterwards made his will, and devised all his real estate in the parish of Sculcoates and other specified places to trustees upon various trusts. Amongst those trusts was the trust to receive and take the rents and profits of the demised premises at Sculcoates and other lands so long as his son George should live and be under the age of twenty-one years, and when he should attain that age upon trust to permit him to receive the rents. After his death the lessees of the demised premises at Sculcoates having elected to exercise the option, the question arose whether the income of the proceeds of sale under the exercise of that option belonged to George or to residue, and the Vice-Chancellor held that in the circumstances and having regard to the special terms of the devise the general rule laid down in *Lawes* v. *Bennett* (1) by Lord Kenyon was not applicable, and that the son George must be treated as entitled to the income of the proceeds of sale. I think I have some indication of intention in this will in the use of the words " or the proceeds of sale " twice over in the trust. They seem to refer to the proceeds of that which had already been contracted to be sold: " Upon trust to sell the same or to retain the same at their absolute discretion and to receive the income to arise therefrom "—that is from the property if retained—" or from any investment or investments for the time being representing the same—that is the property when converted under the trust for sale or the proceeds of sale thereof." These last words are redundant if they are limited in application to proceeds of sale arising under the trust for conversion. It looks as if the testator in using them was contemplating the proceeds of sale of land to be received when the subsisting contract was carried out. On the whole I think I ought to hold the sons entitled to the proceeds of sale of the $10\frac{1}{2}$ acres, the subject-matter of the contract.

Solicitors for all parties: *Richard Davies & Son.*

(1) 1 Cox, 167.

H. L. L.

TOMLIN J.

1928

May 11.

In re STOKES.

BOWEN *v.* DAVIDSON.

[1927. S. 2949.]

Will—Bequest of Trust Funds—Legacy intended for Support of Infant—Interest on Legacies—Time for Commencement—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.

Under the will of a testatrix, F. J. S., three sums of money—two of 8000*l.* each and one of 2500*l.*, referred to in the will respectively as trust funds A, B and C—were bequeathed to the trustees of the will, upon trusts, as to trust fund A, for the testatrix's daughter, M. D., for life, and after her death as in the said will declared, as to trust fund B, similarly for the testatrix's daughter, F. B., and as to trust fund C, upon trust for the testatrix's grandson, R. W., for life, an infant at the date of the testatrix's death, and at the hearing of the summons, and after his death upon trusts in the said will mentioned. A codicil, dated April 15, 1925, gave a life annuity, charged on trust fund A and payable thereout. And the testatrix's daughter, M. D., having predeceased her, a further codicil bequeathed trust fund A, subject to the payment of the annuity, to D. D. for life, and after her death equally between her children.

Upon the death of the testatrix, a summons was taken out for the determination of the question whether trust funds A, B and C, carried interest from the date of the death of the testatrix or from one year thereafter :—

Held, that—(i.) Although the ordinary rule was that a legacy carried interest only from a year after death, trust fund C carried interest from death ; the bequest of it was a provision for the support of the infant legatee, and, since that had to begin from the testatrix's death, the fund carried interest from her death ; (ii.) trust fund A also carried interest therefrom, as the annuity was charged upon it ; (iii.) trust fund B was in the same category as the other two, and also carried interest from her death.

In re Moody [1895] 1 Ch. 101 followed.

Adjourned Summons.

By her will, dated February 8, 1915, Frances Jane Stokes appointed T. Webb Bowen and M. H. Williams, a defendant to the summons, trustees and executors thereof ; and, after specific bequests, she bequeathed to her said trustees a sum of 8000*l.* (in the said will and hereinafter referred to as " trust fund A "), a further sum of 8000*l.* (in the said will and hereinafter referred to as " trust fund B "), and a further sum of 2500*l.* (in the said will and hereinafter referred to as " trust

fund C "), all to be held upon trusts in the said will declared. The trusts of trust fund A were to invest the same and pay the income to the testatrix's daughter Margaret E. B. Davidson for life, and after her death to hold both capital and income upon trust for such child or children or remoter issue of her said daughter in such shares and in such manner as she should by deed or will appoint, and, in default of such appointment, as in the testatrix's will mentioned. Those of trust fund B were to invest the same and to pay the income of the investments to the testatrix's daughter Frances A. M. Bowen (a defendant to the summons), and, after her death, upon trust as in the testatrix's will more particularly mentioned. And the trusts of trust fund C were upon trust to invest the same and to pay the income of the investments to the testatrix's grandson, Roger Wilfrid O. Williams (another defendant to the summons), for life, and after his death, to hold the same, as to both capital and income, as in the testatrix's will more particularly mentioned. At the date of the death of the testatrix, and the hearing of the summons, the said Roger W. O. Williams was an infant. By a codicil to her will, dated April 15, 1925, the testatrix gave to Isabel Margaret Munro an annuity of 100*l.* during her life free of duty; and directed that this annuity should be charged upon and payable out of trust fund A, that it should be payable quarterly, and that the first instalment should be paid within three months after her death. The codicil also directed that, subject to the said annuity and to the life interest of the testatrix's daughter, Margaret E. B. Davidson, trust fund A, and any funds which might accrue to be held on the same trusts, should, if her said daughter made no appointment among her children as the testatrix's will empowered her to do, be held upon trust for Doris M. D. Davidson (another defendant to the summons) absolutely.

The testatrix's said daughter Margaret E. B. Davidson died on April 30, 1925. And by a further codicil, dated August 19, 1925, the testatrix, after reciting the provisions of the above mentioned codicil, revoked those provisions, and bequeathed trust fund A, subject to the said annuity,

TOMLIN J. 1928 STOKES, *In re.* BOWEN *v.* DAVIDSON.

to the said Doris M. D. Davidson for and during her life, and after her death to be divided between the children of the said Doris M. D. Davidson as in the said codicil mentioned.

The testatrix died on February 18, 1928, without having revoked or altered her said will except by the two above mentioned codicils and by five other codicils the provisions of which were not material to the point raised by this summons. The summons was taken out by the said T. Webb Bowen, one of her executors and trustees, for the determination of the question (inter alia) whether trust funds A, B and C respectively, carried interest from the date of the death of the testatrix, or only from the end of one year thereafter.

W. H. Horsley for the summons.

W. Barnard for the first defendant, tenant for life of trust fund A. Interest is payable from the date of the death. The gift of an annuity presupposes that there is a trust fund bearing interest. The annuity is a demonstrative legacy out of the trust fund.

C. D. Myles for the second defendant, tenant for life of trust fund B. The three funds must stand or fall together, because of the way in which they are given. For the purposes of the gift to the trustees, they are treated as a series of gifts. The Court must discover the intention of the testatrix. She has shown that her intention was that interest should be paid from the date of the death, and the annuity is payable from the date of the death. The testatrix has shown that the annuity is to be paid out of the 8000*l.* constituting trust fund A.

J. V. Nesbitt for the third defendant (an infant) tenant for life of trust fund C. Whether the other legacies do or do not carry interest from the death, this one does. There is in the will no express provision as to maintenance, but there is an express clause empowering trustees to advance. There was in existence, at the date of the will, a statutory power of maintenance. And the will must be construed as if s. 43 of the Conveyancing Act, 1881 (now s. 31 of the Trustee Act, 1925), had been incorporated in it:

In re Moody. (1) The general rule is that a legacy to an infant child does not carry interest from the testator's death: *In re Abrahams* (2) was also referred to.

J. W. F. Beaumont for the residuary legatee. The annuity of 100*l.*, payable out of one of the funds, cannot be enough to make the other two funds carry interest from death. The testatrix does not say that the annuity is payable out of income. Where a legacy is payable out of a reversionary fund, interest runs from one year after the death.

Nesbitt in reply. There are many cases which say that where there is, in a will, a gift to a child providing for maintenance, the gift carries interest from death.

TOMLIN J. The question for determination is whether trust funds A, B and C do or do not carry interest from the death of the testatrix. The ordinary rule is that a legacy carries interest only from a year after death, save in certain circumstances, as, for instance, where a testator gives a legacy to his infant child or to a person to whom he stands in loco parentis. It may however be inferred from the context of the will that a legacy not prima facie carrying interest is intended to carry interest from the date of the death. Now I am asked to say that in the present case interest does run from the date of the death. In the case of each legacy, reliance is placed upon the facts that all three legacies are in the same category, that all three are given together in one group to the trustees, and that no distinction is made between any of them: and so it is said that whatever applies to one of them applies to all three. Then, it is said that two of them are clearly intended to carry interest from death—namely, A and C. In support of the contention as to legacy A, reliance is placed upon the fact that the annuity is charged upon it. As to legacy C, it is claimed that it is in the same category as legacy A. The tenant for life of legacy C is an infant grandson of the testatrix. There is no evidence that the testatrix stood in loco parentis to him, nor does the will deal expressly with the question of

(1) [1895] 1 Ch. 101. (2) [1911] 1 Ch. 108.

TOMLIN J. 1928 STOKES, *In re.* BOWEN *v.* DAVIDSON.

maintenance. But it is said that there is a statutory provision as to maintenance, and the case of *In re Moody* (1) is relied upon. At the date of the will, s. 43 of the Conveyancing Act, 1881, applied, and its provisions (re-enacted in s. 31 of the Trustee Act, 1925) must be incorporated into the will. In the case of *In re Moody* (1) Kekewich J. said: "I think the proper course is for me to regard s. 43 of the Act of 1881 as being a paragraph or clause in the particular will which I have to construe, and I proceed to deal with the case on that footing." And he came to the conclusion that the mere fact that there was in the will, in addition to the legacy, a provision for the maintenance of the infant out of residue, did not exclude the rule that a legacy outside the recognized exceptions does not carry interest from the death of the testator. The question in the present case is whether there is some provision which takes the case out of the rule. I think I must adopt the same line as Kekewich J. took, and read into the will the statutory provisions as to maintenance, and the effect of those provisions must be considered. It has been suggested that a provision for maintenance is effective to exclude the rule against carrying interest from death, only where there is an imperative trust to maintain out of income. I think a power to maintain out of income is a sufficient indication of the intention that interest on a legacy is to run from the date of the death. The bequest of the sum with the power to maintain out of income must be treated as an indication that the infant is to be supported out of the legacy, that the testatrix bequeathed the legacy for the support of the infant, and that she intended him to be so supported from the date of her death. I therefore hold that legacy C carries interest as from the date of the testatrix's death. As to legacy A, the fact that the annuity is charged upon it is an indication that the testatrix treated it as producing income out of which the annuity could be paid during the first year after her death. I cannot believe that she intended that payment should be made during that first year out of corpus and during subsequent years out of

(1) [1895] 1 Ch. 101, 106.

income. The testatrix was treating the legacy as a fund producing income from the date of her death. Therefore legacy A also carries interest from the date of her death.

As to legacy B, although there is nothing special from which, if the fund stood alone, it would be proper to infer that it carried interest from the date of the death of the testatrix, from its being one of a group of three legacies, two of which carry interest from the death, I come to the conclusion that this legacy also carries interest from the death. Therefore I will declare that all three trust funds carry interest from the date of the death of the testatrix.

Solicitors: *Simon, Haynes, Barlas & Ireland; Peacock & Goddard; Martineau & Reid.*

A. R. T.

In re ROBINS.

HOLLAND *v.* GILLAM.

[1871. H. 186.]

Law of Property—Trusts of Will—Trustees to divide Income for a Period—Trust for Sale on Cesser—Settled Land or Land held in undivided Shares—Transitional Provisions of Law of Property Act, 1925, *and Settled Land Act,* 1925—*Tenant for Life and Remainderman—Statutory Trusts for Sale—Powers of Management of Trustees—Repairs, Costs of—How borne as between Capital and Income—Discretion of Trustees—Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *s.* 102, *sub-ss.* 1, 3; *Sch. II., para.* 1, *sub-para.* 2—*Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 28, *sub-ss.* 1, 2; *Sch. I., Part IV., para.* 1, *sub-paras.* 1, 3.

A testator who died in 1871 devised his real estate to his trustees upon trust (in the events which happened) to divide the income during a long period namely, during the joint lives and the life of the survivor of a large class of persons, amongst another class of persons, their respective executors administrators and assigns; and declared that on cesser of the said period the land should be sold, and the net proceeds of sale divided amongst a third class of persons only then ascertainable, and he gave his trustees a power of sale until the trust for sale arose. Immediately before the commencement of the Law of Property Act, 1925, all the cestuis que vie were dead except one, and all the original participants in income were also dead except one, and the income for many years had been distributed amongst their respective estates or assigns.

TOMLIN J.

1928

ROBINS, *In re.* HOLLAND *v.* GILLAM.

The question having been raised whether the land was now held in undivided shares within the Law of Property Act, 1925, Sch. I., Part IV., or whether it was settled land unaffected by the provisions of Part IV. :—

Held, that the land was held in undivided shares within Part IV., para. 1, of Sch. I.

In re Higgs' and May's Contract [1927] 2 Ch. 249 followed.

The trustees having received, through their surveyor, a notice from the local authority that certain premises, forming part of the trust estate, were in a defective condition, carried out the necessary repairs, and temporarily paid the cost thereof out of the rents of the trust estate. The summons asked the Court for directions as to how such expenses should be borne as between capital and income.

Held, that, the trustees having asked the Court for directions, the Court was free to determine how the expenses ought to be borne.

In re Gray [1927] 1 Ch. 242 distinguished.

Held further that the expenses should be borne by capital.

In re Hotchkys (1886) 32 Ch. D. 408 followed.

BY his will dated December 3, 1870, E. Robins, of Birmingham in the county of Warwick (hereinafter called "the testator"), after giving certain bequests and legacies therein more specifically referred to, devised his real estate to trustees upon trust, in the events which happened, that they should annually, during the lifetime of the survivor of his three sisters (Elizabeth, Martha and Rebecca), their children, and the children of his then deceased four brothers and sisters (which class of persons is hereinafter referred to as Class A), pay and apply the income as to one-seventh part to his sister Elizabeth during her life, as to one other seventh part to his sister Martha during her life, as to one other seventh part to his sister Rebecca during her life, and as to the residue of the income to divide the same equally between his nephews and nieces living at his decease; and he declared that as and when his said three sisters should respectively die, their respective shares of income should sink into and form part of the residue of the said income, which should thenceforth be equally divided amongst his nephews and nieces and their issue. The testator declared that his trustees should immediately after the decease of the survivor of Class A sell his real estate, and should stand possessed of the proceeds of sale in trust for all the grandchildren of his said brothers and sisters in equal shares who

should be living at the death of the survivor of Class A, and for the respective issue of such grandchildren as should then be dead having issue, such issue to take per stirpes and not per capita in the shares in which their parents, if living, would have taken (which class of persons so ultimately to be ascertained and to participate in the proceeds of sale is hereinafter referred to as Class C). The testator gave to his trustees power to sell his real estate during the period before the said trust for sale arose, and declared that the proceeds of sale should be invested and the income dealt with in like manner as the said income of his real estate. The testator made a codicil dated May 18, 1871, to his said will not affecting the subject-matter of this report, and died on July 1, 1871.

An action for administration of the estate (*Holland and Others* v. *Gillam and Others*, [1871. H. 186]) was commenced shortly after the testator's death, and by an order on further consideration, dated June 25, 1873, it was declared (inter alia) that, according to the true construction of the will (he never having had any child), the income of the real estate was, from the testator's death, divisible, and the persons entitled thereto were as therein set forth—namely, (1.) during the period between the death of the testator and that of his sister Elizabeth on February 23, 1872, in the shares and amongst the persons therein mentioned; (2.) during the period between the last mentioned date and the death of his sister Martha on August 19, 1872, in the shares and amongst the persons therein mentioned; (3.) during the period between the last mentioned date until the death of his sister Rebecca (who was then living) in the shares and amongst the persons therein mentioned; and that (4.) from the death of Rebecca and during the lives of the members of Class A, and the life of the survivor of them, the income would be divisible into twenty-three equal parts, and would belong as to each twenty-third part to each of twenty-three persons therein named (which class of persons is hereinafter referred to as Class B) and their respective executors, administrators and assigns. The testator's sister Rebecca

TOMLIN J.
1928
ROBINS, *In re.* HOLLAND v. GILLAM

died on March 13, 1874. The income of the real estate had ever since her death been distributed by the trustees in twenty-three shares. The twenty-three persons constituting Class B (being the original recipients of income named in the order on further consideration) had all died except one, and their respective shares of income had been paid to their respective personal representatives or their assigns. One member only of Class A survived, so the period of the trusts of income was still subsisting, and the trust for sale had not arisen.

A question having arisen whether after January 1, 1926, the trustees of the will could make a title on sales of the real estate without a vesting deed having been made, the trustees issued a summons in the action for the determination of (inter alia) the question whether immediately before the commencement of the Law of Property Act, 1925, the land was held at law or in equity in undivided shares vested in possession within the meaning of Sch. I., Part IV., para. 1, to that Act, and if not, then whether the land was settled land within the meaning of the Settled Land Act, 1925, unaffected by Part IV. as aforesaid, and if the land was settled land unaffected as aforesaid, whether there was any tenant for life, or whether the trustees had the powers of a tenant for life. As certain sales had taken place since January 1, 1926, the trustees selling as trustees for sale, the summons asked for leave (if the land should be held to be settled land outside Part IV. of that Schedule) to execute confirmatory deeds under the Law of Property Act, 1925, s. 66, when the requisite vesting deed had been executed.

Nicholson Combe for the applicants, the trustees of the will. The land was not, immediately before 1926, held in undivided shares within the meaning of the Law of Property Act, 1925, s. 39, sub-s. 4, and therefore Sch. I., Part IV., did not apply. The will vested the land in the trustees at law, on trust for a long period, which was still existing, to divide the net income amongst certain persons. The fractions in the income had altered four times. Since the death of Rebecca in 1874

the distribution had been in twenty-three shares, and would so continue until the dropping of the last life of Class A. But that did not create undivided shares in the land. Until the trust for sale arose there were only mere trusts of income. The owners of the shares in the proceeds of sale (composing Class C) would only be ascertainable when the trust for sale arose. Their contingent interests did not constitute undivided shares in land.

The position immediately before 1926 was that the land was settled land under the Settled Land Acts, 1882 to 1890. The trustees, having an interim power of sale, were trustees for the purposes both of those Acts and of the Settled Land Act, 1925. There was no tenant for life, as many of the shares of income were in fiduciary owners. Accordingly, under s. 23, sub-s. 1, of that Act, the trustees had the powers of a tenant for life. The legal estate on January 1, 1926, remained in the trustees, under the Law of Property Act, 1925, Sch. I., Part II., para. 6 (*c*). The trustees would execute the vesting deed under the Settled Land Act, 1925, Sch. II., para. 1, sub-para. 2. Otherwise, under s. 13 of that Act, no purchaser could obtain a legal estate. As to the sales since 1925, the summons asked for leave to make confirmatory deeds, after the necessary vesting deed had been made. The leave of the Court was necessary under the Law of Property Act, 1925, s. 66, sub-s. 2. All future sales would be made after the vesting deed had been executed.

But for the two cases of *In re Flint* (1) and *In re Higgs' and May's Contract* (2) the position would be clear. Apparently in *In re Flint* (1) Astbury J. assumed that trusts of this kind brought the case within s. 39 of the Law of Property Act, 1925, and Sch. I., Part IV. The point having unfortunately been thus prejudiced, Eve J. in *In re Higgs' and May's Contract* (2) accepted the same hypothesis; but again the point that the case was entirely outside Part IV. was not apparently taken. It is submitted that that hypothesis was wrong.

(1) [1927] 1 Ch. 570. (2) [1927] 2 Ch. 249.

TOMLIN J.
1928
ROBINS, *In re.* HOLLAND *v.* GILLAM.

The Legislature in putting an end to the system of land-holding in law in undivided shares was aiming at a real mischief. Where land had been split into undivided shares, those shares devolving independently, became subdivided through devolutions and dispositions, so that ultimately the making of title to the entirety became a difficult matter, to the mutual detriment of all the co-owners. The legislative method of dealing with that mischief was to prohibit by the Law of Property Act, 1925, s. 34, sub-s. 1, the creation of undivided shares in land in the future, and to make every future conveyance, devise, or settlement purporting to create undivided shares operate as creating a trust for sale: see s. 34, sub-ss. 2, 3 and 4; while the beneficiaries' rights were shifted from the land to the proceeds of sale. Sect. 39, sub-s. 4, dealt with subsisting cases of land held in undivided shares at the end of 1925, and relegated all such cases to Part IV. of Sch. I., the provisions of which by s. 39, sub-s. 4, were expressed to be for the purpose of subjecting such land to a trust for sale.

But to bring a case within Part IV., undivided shares in the land must have been created. In the present case no undivided shares in the land had been created. A trust to divide income for a period did not necessarily create undivided shares. On the authorities an undivided share in land was a separate ownership devolving separately. In freehold land, an undivided share was held to be a separate freehold. Once land had become split into undivided shares, those shares never coalesced either at law or in equity, except through some limitation or trust of the shares themselves. Coalescence often happened through cross-remainders. There was, for instance, a wide distinction between land held in trust for persons for their lives, and land in several undivided shares where each share was separately settled. In the first case the land might be afterwards split into undivided shares devolving separately. In the second case the shares might coalesce and devolve as an entirety. But in the present case the splitting of the land into twenty-three undivided shares was the very thing the will did not do. That would have

been entirely contrary to the whole scheme, which was to keep the legal estate in the land in the trustees from first to last, for the purpose of distributing the net income for the specified period, and then to sell and distribute the proceeds amongst other persons. The statute subjects the land to a trust for sale, and not the income. Accordingly, the present case was not within the mischief of the Act, for there could never have been any independent devolving of the shares in the land.

The case of *In re Colyer's Farningham Estate* (1) is an illustration of income trusts while the land was held in ultimate undivided shares, the ultimate interest having become split into undivided shares by the will of the heir at law, who died before 1926. To treat the trusts in the present case as creating undivided shares so as to bring the case within Part IV. would be inconsistent with *In re Frewen* (2) and with the Settled Land Act, 1925, Sch. II., para. 2. That paragraph contemplates plurality of income-takers in cases of settlements subsisting immediately before 1926, and that such settlements are not within Part IV. of Sch. I. to the Law of Property Act, 1925. The words "person or persons, ... including themselves," indicate that "persons" is in the plural before the trustees are included. To support the hypothesis adopted in *In re Flint* (3) and in *In re Higgs' and May's Contract* (4) it is necessary to predicate that the Acts of 1925 allow no settlements subsisting at the end of 1925 to continue as settlements of land if there be more than one participant in the income, although the Settled Land Act, 1925, contemplates plurality of such participants: see s. 19, sub-ss. 2, 3.

Apparently sub-para. 3 of para. 1 of Part IV. of the Law of Property Act is a source of misleading. But the words "if the entirety of the land is settled land," apply to such cases as *In re Morris' Settled Estates* (5), where the Court of Appeal held that the entirety, divided into undivided shares,

(1) [1927] 1 Ch. 677.
(2) [1926] Ch. 580.
(3) [1927] 1 Ch. 570.
(4) [1927] 2 Ch. 249.
(5) [1920] 2 Ch. 229.

TOMLIN J. 1928 ROBINS, *In re.* HOLLAND *v.* GILLAM.

was settled land, although there was no tenant for life of the entirety. The conception that the words " held in equity " in para. 1 of Part IV. enlarge the scope so as to bring in land which otherwise would not be in undivided shares is, it is submitted, unsound. An undivided share was no less strictly such, merely because it was held in equity. In fact, in the great majority of cases, most of the shares were held in equity, where the land had been, for any length of time, held in undivided shares. As Part IV. did not apply, para. 4 (added by the Law of Property (Amendment) Act, 1926) has no bearing on the case.

As the hypothesis accepted in *In re Flint* (1) and in *In re Higgs' and May's Contract* (2) is, it is submitted, contrary not only to first principles, but to the provisions of the Settled Land Act, 1925, Sch. II., para. 2, and is inconsistent with *In re Frewen* (3), it is open to the Court to treat the present case as res integra, and to correct the error.

Norman Daynes for respondents interested in income adopted Nicholson Combe's argument, and referred to *In re Myhill* (4) and *In re Dawson's Settled Estates.* (5) It is submitted *In re Higgs' and May's Contract* (2) should be reconsidered, because the point whether such a case falls within the Schedule to the Law of Property Act, 1925, or not was not argued and was not brought to the notice of the learned judge who decided the case.

C. Church for other respondents interested in income.

H. Lloyd Williams for respondents contingently interested in corpus only. It falls within Part IV. of Sch. I. to the Law of Property Act, 1925. The limitations in *In re Higgs' and May's Contract* (2) are similar to these limitations. The same view is borne out by *In re Dawson's Settled Estates.* (5)

TOMLIN J. The point for determination in this case is really whether the land, the subject-matter of the settlement, is settled land which does not fall within the Law of Property Act, 1925, Sch. I., Part IV., or whether it is land which is held

(1) [1927] 1 Ch. 570.
(2) [1927] 2 Ch. 249.
(3) [1926] Ch. 580.
(4) Ante, p. 100.
(5) Ante, p. 421.

at law or in equity in undivided shares vested in possession so as to fall within one or other of the sub-paragraphs of para. 1 of Part IV. of the Schedule. [His Lordship stated the effect of the material parts of the will as substantially set out above.]

The effect of the testator's dispositions is really this, that in the events which have happened, the property was held on trust during the lives or life of the survivors or survivor of a number of persons for the division of the income amongst certain persons. Mr. Nicholson Combe has conveniently placed them into classes, for instance: it was during the lifetime of the survivors or survivor of class A, to pay the income amongst class B, and after the death of the survivor of class A, to sell and divide the proceeds of sale amongst class C.

Now the question is, there being still living one or more of class A so that the income is still being divided amongst class B, and the trust for sale not having arisen, and the interest of class C (who are contingent and ascertainable only on the extinction of class A) not having become vested, whether—as their interest becomes vested—it falls within the language of Part IV. of Schedule I. of the Act of 1925.

A number of cases have been referred to in the argument, in which it has at any rate been assumed that a trust (which it is difficult to distinguish from this trust) does in fact fall within Part IV. of the Schedule. The first case that has been brought to my notice was one before Astbury J., *In re Flint.* (1) There no trust for sale, I think, existed, but apart from that it is difficult to see how the case can be distinguished from the present one. The question was this: whether—there being a power of sale in the will—a right of pre-emption (which arose on the exercise of the power of sale), arose upon the exercise of the statutory trust for sale; and the case was concluded upon the basis that the statutory trust for sale applied, that is, that it was within Part IV.; and the point for consideration was whether the right of pre-emption attached in those circumstances. I do not myself see any sign in that case of there having been any argument directed to

(1) [1927] 1 Ch. 570.

TOMLIN J. 1928 ROBINS, *In re.* HOLLAND *v.* GILLAM.

the particular point that I have to determine here, but it was certainly assumed, and the learned judge says that it was not disputed, that before the commencement of the Law of Property Act, 1925, land was held in equity in undivided shares vested in possession. So that it does not seem to have occurred to the learned judge that it was arguable that the case did not fall within Part IV.; and he proceeded upon that footing, since it was not in fact disputed.

The next case was one before Eve J., and that goes a little further, because in *In re Higgs' and May's Contract* (1) there was a trust for sale, that is to say, there was a trust for paying the income amongst a number of people up to a certain time, and then when the time for the division of the income came to an end, the trustees were to sell and to divide the proceeds between a certain class. There the language of the trust is such that it seems to me to be impossible to distinguish it from the language of the trust in this case so far as the effect of it goes. Substantially the trust is on the same lines. The point which the learned judge was invited to decide was whether the case fell within para. 4 added to Part IV. of Schedule I. of the Act of 1925 by the Schedule to the Law of Property (Amendment) Act, 1926, or whether it fell within sub-para. 3 of para. 1, of the original Part IV. of Schedule I. of the Act of 1925. The learned judge certainly decided that the entirety of the land was settled land, for he begins his judgment by saying: "On January 1, 1926, the entirety of the land was settled land, held under one and the same settlement in equity in undivided shares vested in possession, and by virtue of para. 1, sub-para. 3, of Part IV. of Schedule I. to the Law of Property Act, 1925, would appear on that date to have vested in the applicants as trustees of the settlement as joint tenants upon the statutory trusts; . . . ." and then he says the purchaser declined to accept the title on that basis, and he decided that it came within para. 1, sub-para. 3, of Part IV. of Schedule I. to the Law of Property Act, 1925, and that it was not affected by the new para. 4 added by the Schedule to the Act of 1926.

(1) [1927] 2 Ch. 249, 252.

Now it seems to me that if I am to decide, as I am asked to do by Mr. Nicholson Combe, that this is a case which does not fall within Part IV., I should certainly be arriving at a conclusion which could not be reconciled with the conclusion at which Eve J. arrived in *In re Higgs' and May's Contract.* (1) I do not think that *In re Frewen* (2) to which I was referred is necessarily inconsistent with *In re Higgs' and May's Contract.* (1) I think that it may well be capable of being distinguished, and the subsequent cases of *In re Myhill* (3) before Astbury J. and *In re Dawson's Settled Estates* (4) before Clauson J., although they are not precisely so closely in point as the case before Eve J., may, I think, be fairly said to point in the same direction.

Now the first question is whether I ought to arrive at a conclusion which is inconsistent with those decisions, especially the decision in *In re Higgs' and May's Contract.* (5) This is a conveyancing matter, and it is very desirable that there should be uniformity on such a question. As a matter of mere convenience, probably the view which is embodied in *In re Higgs' and May's Contract* (5) and in *In re Myhill* (3) is the more convenient of the two, because the other view would involve the execution of a vesting deed. I certainly hold no strong view—or perhaps I may go so far as to say any view—that there is any language in this Schedule which is inconsistent with that. What view I might have taken about the matter, if it has been res integra, I do not know. The thing that matters is that it has been already, so it seems to me, decided in one direction, and I can see nothing which would justify me in deciding this in a way inconsistent with what has already been determined by Eve J. in *In re Higgs' and May's Contract.* (5) I shall therefore hold that on the true construction of this will and in the events which have happened, the case falls within the Law of Property Act, 1925, Sch. I., Part IV.

A. R. T.

(1) [1927] 2 Ch. 249, 252.
(2) [1926] Ch. 580.
(3) Ante, p. 100.
(4) Ante, p. 421.
(5) [1927] 2 Ch. 249.

TOMLIN J.
1928
ROBINS, *In re.* HOLLAND *v.* GILLAM.

June 6. A further question now arose as to whether the cost of certain repairs to part of the trust premises was to be borne by capital or income. On December 23, 1927, the surveyor of the trust estate received a notice from the city surveyor of Birmingham calling his attention to the defective condition of the freehold premises, No. 16A Moat Lane, Birmingham, part of the trust estate. The surveyor thereupon inspected the premises, prepared a specification and plan, and obtained estimates for carrying out the necessary work. He submitted the notice, specification, plan and estimates to the trustees, with a statement of the facts, and they instructed him to accept an estimate to do the necessary work for the sum of 95*l.*, that being the lowest estimate obtained. The work was completed, and the surveyor, on the instructions of the trustees, temporarily paid the sum of 94*l.* 14*s.* 8*d.* out of the rents of the trust estate until the matter could be brought before the Court for approval. The question how this sum of 94*l.* 14*s.* 8*d.* was to be borne now came on for decision.

Lloyd Williams. These repairs are repairs authorized by s. 102, sub-s. 2, of the Settled Land Act, 1925, and the expenses incurred by the trustees are, by virtue of s. 28, sub-s. 2, of the Law of Property Act, 1925, payable out of income. This has been so decided by Clauson J. in *In re Gray* (1), and it is no longer open to the Court to direct otherwise.

Norman Daynes. This case is not on all fours with *In re Gray.* (1) In that case the trustees had already exercised their discretion, which they undoubtedly had the right to do, and had paid the expenses of the repairs out of income. In those circumstances Clauson J. simply held that he had no power to override the use of the exercise of that discretion. Here the trustees have not exercised their discretion, but they come to the Court, and ask the Court to direct how the expenses ought to be borne. In these circumstances the Court still has power to exercise a discretion, and it ought to direct that the expenses must be borne by capital: *In re Hotchkys.* (2)

(1) [1927] 1 Ch. 242. (2) 32 Ch. D. 408.

TOMLIN J. The point which falls for determination now is how certain expenses are to be borne which have been incurred by the trustees as the result of the service upon them of a dangerous structure notice under the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34). They executed the necessary repairs, and they, in the first instance, paid those repairs out of income without prejudice as to how they should ultimately be borne, and they are now asking me to determine how, as between income and capital, that expenditure should be distributed. Under the Towns Improvement Clauses Act it is plain that the expenditure is one which, if the owner makes default, can be incurred by the authority, and that ultimately the authority, in certain events, has power to sell the property and apply the proceeds in repayment to themselves of the money expended in executing the work. I have no difficulty in coming to the conclusion that, apart from recent legislation, it is one of those cases in which the Court would undoubtedly have held that this expenditure is of such a character that it ought, upon the general principles governing the Court in matters of this kind, to be borne by capital, so that the burden is distributed between capital and income, capital losing the sum, and income losing the interest on the sum. But it is said that I have no longer a free hand to deal with the matter in the way which was described by one learned judge as common justice, and that I am to-day bound by the provisions of the recent statutes to deal with it in a wholly different way. It is further said that I shall find, if I look at authority, that the statutes have been so construed as to lead to that result.

The first relevant section is s. 28 of the Law of Property Act, 1925, as amended by the Law of Property (Amendment) Act, 1926. Sub-s. 1, as amended, reads as follows: "Trustees for sale shall, in relation to land or to manorial incidents and to the proceeds of sale, have all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925, including in relation to the land the powers of management conferred by that Act during a minority: and where by statute settled land is or becomes vested in the

TOMLIN J.
1928
ROBINS, *In re.* HOLLAND *v.* GILLAM.

trustees of the settlement upon the statutory trusts, such trustees and their successors in office shall also have all the additional or larger powers (if any) conferred by the settlement on the tenant for life, statutory owner, or trustees of the settlement; and (subject to any express trust to the contrary) all capital money arising under the said powers shall, unless paid or applied for any purpose authorized by the Settled Land Act, 1925, be applicable in the same manner as if the money represented proceeds of sale arising under the trust for sale." The effect of that is that trustees in the position of these trustees—and I have already held that they are trustees with a statutory trust for sale — have vested in them the powers of management which are conferred during minority upon trustees under the Settled Land Act, 1925. It has been held by Clauson J. in *In re Gray* (1) that although those powers under the Settled Land Act, 1925, are confined to minority, the powers given by reference to s. 28 are not confined to minority, and that seems reasonably obvious, the reference to minority in s. 28 being only a descriptive reference, and not a reference for the purpose of limiting the powers: so that it comes to this, that the trustees have vested in them those powers.

Now turning to s. 102 of the Settled Land Act, 1925, we ascertain what those powers are. Under sub-s. 1 the powers include a wide power to execute repairs and sub-s. 3 is in these terms: "The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land." So that there the trustees have the power conferred upon them of paying expenses incurred in management out of income. It is to be observed that the section does not say that they shall pay the expenses of management out of income: the section says they may pay, and it

(1) [1927] 1 Ch. 242.

seems to me plain that under that sub-section of s. 102 there rests upon the trustees a duty to exercise a proper discretion, and that if they have in fact incurred expenses in relation to repairs, it is their duty to consider whether those expenses are expenses which properly they ought to pay out of income or out of capital.

That being so, they are in the same position under s. 28 of the Law of Property Act, 1925, unless, as is said, their position is altered by sub-s. 2 of that section. Sub-s. 2 is in these terms: "Subject to any direction to the contrary in the disposition on trust for sale, or in the settlement of the proceeds of sale, the net rents and profits of the land until sale, after keeping down costs of repairs and insurance and other outgoings shall be paid or applied, except so far as any part thereof may be liable to be set aside as capital money under the Settled Land Act, 1925, in like manner as the income of investments representing the purchase money would be payable or applicable if a sale had been made." It is said that because in that sub-section the words are "after keeping down costs of repairs and insurance and other outgoings," that that makes it obligatory on trustees acting under s. 28 to pay the costs of all repairs out of income: in other words, that it deprives them of any discretion they may have under s. 102, and makes it compulsory on them to pay for all repairs out of income. It is said that that is the result, because that interpretation has been put upon the section by Clauson J. in *In re Gray*. (1) Before I consider whether that is so, I desire to say this, that, apart from authority and unless I am compelled by authority to take a different view, I am satisfied that on the true construction of these sections the position is this: that trustees have a discretion in regard to the costs of repairs, whether they will pay them out of income or not, that "the costs of repairs" referred to in sub-s. 2 of s. 28 makes those repairs repairs which are properly payable out of income, that is to say, repairs which the trustees in exercise of their discretion have determined to pay out of income, and that sub-s. 2 of s. 28

(1) [1927] 1 Ch. 242.

TOMLIN J.
1928
ROBINS, *In re.* HOLLAND *v.* GILLAM.

does not deprive the trustees of their power to exercise a discretion in the matter, and does not compel them to pay all repairs, whatever they be, out of income, even though obvious justice demands that those repairs should be paid out of corpus. Now that is my view of the section, and of the meaning of the section, and the only question is whether it is my duty to take some other view because some other judge thinks differently about it. I am referred to the decision of Clauson J. in *In re Gray.* (1) It seems to me that the decision in *In re Gray* (1) contains nothing which compels me to depart from the view which I have indicated. In that case the position was this, that the trustees had executed a number of repairs and had paid for them out of income; they were contemplating executing further repairs, and the assignee of the life interest, that is the person entitled to the income, objected to their being paid out of income, and he came to the Court and said that the trustees ought not to pay them out of income, and the learned judge, as I read his judgment, held that the trustees had the power to pay them out of income; they had a discretion, and if they chose to exercise that discretion and pay them out of income, it was not for the Court to interfere, and, as I read it, he said that where the trustees exercise their discretion and determine to pay the expenses in a particular way, it is no longer open to the Court to say: "We do not think you have done right, you ought to have exercised your discretion in some other way, and we are free to deal with it on the principle of *In re Hotchkys.* (2)" That is only saying what has been said so often in this Court, that where the trustees have a discretion and have exercised the discretion bona fide, the Court will not interfere with it. But that is a wholly different position from the position here. The position here is that the trustees come, and say: "We have executed these repairs, we have provided for them temporarily out of income, we are not prepared to exercise our discretion, and we invite the Court to tell us how the expenses ought to be borne between the parties"; and, in

(1) [1927] 1 Ch. 242. (2) 32 Ch. D. 408.

those circumstances, the Court to-day in my judgment is in the same position as it was before January 1, 1926, and is free to determine how the expense of these repairs ought to be borne, and that the Court in arriving at a conclusion upon that matter is bound to adhere to those principles which have been laid down again and again in such cases as *In re Hotchkys.* (1)

Adopting that view of this case, I hold that these repairs ought to be paid for out of corpus, and in doing that I do not consider I am doing anything that is inconsistent with the decision of Clauson J. in *In re Gray.* (2) That case seems to me to be confined to the simple point that where the trustees have exercised the statutory discretion conferred upon them by the statute, it is not for the Court to interfere.

Solicitors: *Iliffe, Sweet & Co., for E. R. Williams & Son, Birmingham; Winter & Co.*

P. J. B.

In re JOHNS.

WORRELL *v.* JOHNS.

[1927. J. 3140.]

Bankruptcy—Bargain Void as being in Violation of the Bankruptcy Laws—Mortgage Deed—Proviso for Retention of Bonus by Mortgagee—Clause giving Mortgagee an increased Benefit if Mortgagor became a Bankrupt—Bankruptcy of Mortgagor—Death of Mortgagee—Claim by personal Representatives of Mortgagee—Claim by Trustee in Bankruptcy—Payment of Interest.

By a mortgage deed, whereby W. J. the mortgagor assigned by way of mortgage to his mother E. J., the mortgagee, the share to which the said W. J. was entitled to in reversion under his father's will subject to his mother's life interest, it was (inter alia) agreed that out of the sum to be advanced, namely, 1650*l.*, the mortgagee should immediately on the execution of the mortgage deed retain a bonus of 1000*l.*, and the remaining 650*l.* should be paid to the mortgagor by monthly instalments

(1) 32 Ch. D. 408. (2) [1927] 1 Ch. 242.

TOMLIN J.

1928

JOHNS, *In re.* WORRELL *v.* JOHNS.

of 10*l.* with interest at 5 per cent. And in the mortgage deed there was a proviso to the effect that if the mortgagor should not before the death of the mortgagee charge his property or become a bankrupt, on the death of the mortgagee, the mortgagor could discharge his obligation by paying back the 650*l.* and nothing more without interest; but if the mortgagor became a bankrupt in the lifetime of the mortgagee, the mortgagee could as against his trustee in bankruptcy, claim not only the 1000*l.* (retained to satisfy the bonus), but any or all of the 10*l.* monthly advances up to the full amount of the loan with interest at 5 per cent. The mortgagor became a bankrupt in the lifetime of the mortgagee.

On the death shortly afterwards of the mortgagee, a question arose as to the rights of the mortgagor's trustee in bankruptcy, having regard to the proviso in the mortgage deed:—

Held, that such a device as was contained in the mortgage deed was bad as being in violation of the bankruptcy laws; that it was reasonably plain that the proviso was really a device to secure that something more was to come to the mortgagee if the mortgagor became bankrupt than if he did not; and that the mortgagee was only entitled to hold the property assigned as security for the moneys actually advanced and to be repaid only such moneys with interest at 5 per cent.

The principles laid down in *Ex parte Mackay* (1873) L. R. 8 Ch. 643 and *Ex parte Williams* (1877) 7 Ch. D. 138 followed and applied.

ORIGINATING SUMMONS.

By his will, dated February 17, 1890, Henry B. Worrell (hereinafter called "the testator"), who died on May 12, 1892, after appointing executors and trustees thereof and making certain specific and pecuniary bequests, devised and bequeathed all his residuary real and personal estate unto his trustees upon trust for sale, calling in and conversion, and out of the moneys to be produced thereby and his ready money, to pay his funeral testamentary expenses debts and legacies. And the testator further directed that his trustees should at their discretion invest the residue of the said moneys, and stand possessed of the residuary trust moneys and investments representing the same, upon trust to pay the whole income thereof to his wife Emily M. Johns during her life and after her death in trust for all his children at twenty-one or marriage in equal shares. At his death the testator left him surviving nine children, of whom a son, Wallace H. Johns, was one. From time to time the trustees of the will of the testator in pursuance of a power contained therein, and with the consent of the widow, advanced to

the son, Wallace H. Johns, moneys amounting in the aggregate to over 900*l.*, on account of his expectant share as one of the children of the testator. The widow, the said Emily M. Johns, also from time to time advanced to her son, the said Wallace H. Johns, various sums of money by three several indentures of mortgage. By the first, dated November 25, 1907, and made between the said Wallace H. Johns (hereinafter called "the mortgagor") of the one part and his mother, the said Emily M. Johns (hereinafter called "the mortgagee," which expression was to include her executors administrators and assigns), of the other part, the mortgagee agreed to lend the mortgagor the sum of 1650*l.* on certain terms, and on the security of the mortgagor's then expectant one-ninth share in the residuary real and personal estate of the testator.

Among the recitals in the deed were the following, which contained the terms upon which the said sum of 1650*l.* was advanced—namely: "And whereas the mortgagor has requested the mortgagee to lend him the sum of 1650*l.* which the mortgagee has agreed to do upon having the repayment of the same with interest secured in manner hereinafter appearing and upon the terms that the mortgagor shall upon the execution hereof pay to her a bonus of 1000*l.* And whereas upon the treaty for the said loan it was agreed that the sum of 1010*l.* part of the said sum of 1650*l.*, should be advanced by the mortgagee to the mortgagor on the execution of these presents, but that the mortgagee should retain thereout the said bonus of 1000*l.*, and that the residue of the said sum of 1650*l.* should be advanced by the mortgagee to the mortgagor by instalments and in manner and on the conditions provided by the covenant of the mortgagee hereinafter contained."

In the operative part of the deed were the following clauses: Clause 1. "In consideration of the sum of 1010*l.* now advanced to the mortgagor by the mortgagee, whereof the sum of 1000*l.* has been retained by the mortgagee in discharge of the said bonus of 1000*l.* payable to her as aforesaid, and the sum of 10*l.* balance of the said sum of 1010*l.*,

TOMLIN J. 1928 JOHNS, *In re.* WORRELL *v.* JOHNS.

has been paid by the mortgagee to the mortgagor (the receipt whereof the mortgagor hereby acknowledges) and of the covenant of the mortgagee hereinafter contained for the loan to the mortgagor of the further sum of 640*l.* by the instalments and on the conditions hereinafter mentioned, the mortgagor hereby covenants with the mortgagee to pay to the mortgagee at the expiration of one calendar month after the death of the said Emily Maria Johns (the mortgagee) the sum of 1010*l.* with interest thereon in the meantime at the rate of 5 per cent. per annum from the date of these presents, and also every sum which may be advanced to the mortgagor by the mortgagee under the covenant of the mortgagee hereinafter contained with interest thereon in the meantime at the rate aforesaid from the time of the same being advanced. . . . ."

By clause 2, the mortgagor as beneficial owner assigned unto the mortgagee his one-ninth then expectant share in the residuary real and personal estate of the testator or any part thereof, and the income thereof, together with all powers and remedies for recovering payment of the same subject to the usual proviso for redemption.

Clause 4 was in the following terms: "The mortgagee hereby covenants with the mortgagor that the mortgagee will advance to the mortgagor the further sum of 640*l.* (making with the said sum of 1010*l.* the said sum of 1650*l.*) by 64 equal instalments of 10*l.* each, the first of such instalments to be payable at the expiration of each succeeding four weeks. Provided always that the obligation of the mortgagee to make or continue such advances as aforesaid shall cease upon the death of the said Emily Maria Johns (the mortgagee)."

By clause 5 it was provided as follows: "Provided always and it is hereby agreed that if prior to the date of the death of the said Emily Maria Johns (the mortgagee) the said Wallace Hilditch Johns (the mortgagor) shall not have (otherwise than by these presents or by will or codicil or with the previous consent in writing of the said Emily Maria Johns), assigned or charged or affected to assign or charge

the share and premises hereinbefore assigned or any part thereof or any interest therein and no other event (except the death of the said Wallace Hilditch Johns) shall have happened whereby the said share and premises or any part thereof or any interest therein should have become vested in or charged in favour of some other person or persons or a corporation and if the mortgagor shall at the expiration of one calendar month after the death of the said Emily Maria Johns or so soon thereafter as the said part or share of the mortgagor of and in the residuary real and personal estate of the said testator hereby assigned shall be available for his paying the same, pay to the mortgagee a sum equal to the total amount of the monies which shall have been actually paid by the mortgagee to the mortgagor, that is to say the sum of 10*l.* paid upon the execution of these presents, and every sum which shall have been advanced to the mortgagor by the mortgagee under the covenant of the mortgagee hereinbefore contained, then the mortgagee shall accept such sum in full satisfaction and discharge of all monies whether for principal or interest for the time being owing upon the security of these presents."

The second indenture of mortgage was dated June 5, 1911, and was made between the same parties as the first mortgage. By this deed further sums were advanced by the mortgagee, the said Emily M. Johns, to the mortgagor, the said Wallace H. Johns. There was no provision for a bonus in this mortgage, but there was a clause similar to clause 5 in the first mortgage.

The third mortgage was dated January 11, 1913. In this deed there was a provision for a bonus similar to that contained in the mortgage dated November 25, 1907; and a similar proviso in the event of the mortgagor charging his interest in the one-ninth share to which he was entitled under the will of the testator and which was assigned by the mortgage deed, or becoming a bankrupt.

On August 8, 1924, a receiving order in bankruptcy was made against the said Wallace H. Johns, and on September 12 following, he was adjudicated a bankrupt.

TOMLIN J.
1928
JOHNS, *In re.* WORRELL *v.* JOHNS.

In January, 1926, the trustee in bankruptcy wrote to the trustees of the testator's will claiming any money coming from the testator's estate to the bankrupt or his mortgagees, on the death of his mother, Emily M. Johns, as property belonging to the estate of the bankrupt, over and above the amount due for principal without interest actually advanced by the said Emily M. Johns to the bankrupt, under the mortgages given by him to her.

The said Emily M. Johns died on November 10, 1927, and her legal personal representatives furnished a statement, showing that at the date of her death the total amount, including the two bonuses, due to her under the three mortgages was considerably in excess of the amount which would be payable in respect of the balance of the one-ninth share of the bankrupt Wallace H. Johns.

On the trustee in bankruptcy refusing to withdraw his claim or allow the trustees of the will to pay over the balance of the one-ninth share of the bankrupt to the personal representatives of the said Emily M. Johns, an originating summons was issued for the determination (inter alia) of the following question :—

1. Whether the plaintiffs (the trustees of the testator's will) should pay over to the personal representatives of Emily M. Johns as mortgagee of the share of the said Wallace H. Johns in the residuary estate of the testator, the whole of the said share or whether they should pay over to them only a part, and, if so, what part thereof, and should pay any balance to the trustee of the property of Wallace H. Johns, a bankrupt.

A. P. Vanneck for the trustees of the will.

F. Whinney for the respondent Alice R. Johns, one of the personal representatives of the widow, the mortgagee.

The claim is that the executors of the testatrix's will should pay over the whole of the share, because it is a long way short of the amount owing on the advances. There is a covenant to pay that amount, and that covenant has not been impeached in any way whatever. The covenant is a covenant to pay the bonus so long as the amount is advanced. The

document is not a settlement executed by the bankrupt himself to defraud his trustee in bankruptcy. It is a settlement which had been executed in favour of the bankrupt: see *Mainland* v. *Upjohn*. (1)

H. Johnston for the trustee in bankruptcy of the mortgagor. The deed between the mother and the son was a mortgage on the terms that the son was not to be able either to redeem or to repay to her, and that, if he went bankrupt, his trustee in bankruptcy should be able to redeem only by paying 1650*l*., and not the 650*l*. That is a proviso which is bad as against the bankruptcy laws, because it contrives that part of the property which ought to be available for the creditors shall not be available for them: see *Ex parte Mackay* (2) and *Ex parte Williams*. (3)

TOMLIN J. In this case the trustees of the will of a testator who died in May, 1892, seek in effect directions as to how they are to deal with the share of a son of the testator, to which he was entitled under the will and which has become distributable by reason of the death, on November 10, 1927, of his mother, the testator's widow, who was tenant for life.

The circumstances in which the trustees ask for the direction of the Court are these: that the widow during her life made certain advances to the son in question upon the terms of certain mortgage deeds, and subsequently, namely in 1924, the son was adjudicated a bankrupt. The trustee in bankruptcy, who is the second defendant, is now asserting that, having regard to the general law regarding the validity of certain provisions in the deeds relating to bankruptcy, there is now due upon those mortgages a much less sum than is in fact claimed by the first defendant, who represents the legal personal representatives of the widow.

Now it is plain that prima facie on such a summons as this, I have no jurisdiction to determine that question, but the defendants have submitted here to the jurisdiction for the purpose of enabling me to determine the question of law which arises in connection with this summons. There were

(1) (1889) 41 Ch. D. 126, 136. (2) L. R. 8 Ch. 643.
(3) 7 Ch. D. 138.

TOMLIN J. 1928 JOHNS, *In re.* WORRELL *v.* JOHNS.

three mortgages, the first one being dated November 25, 1907, and it was made between the widow and her son, the bankrupt, he then not being a bankrupt, although I have little doubt that his financial affairs were not fully satisfactory. [His Lordship read the recitals of the mortgage as substantially set out above relating to the bonus.] Now it is to be observed that so far as that bargain is concerned, it seems to contain elements which do not suggest the more affectionate relationship of mother and son, but rather the relationship of moneylender and borrower. The effect seems to be this: the mortgagor—that is the son—is to have, at any rate, a theoretical advance of 1650*l.*, he is to repay that with interest, he is also to pay a bonus of 1000*l.* for the loan, which he is to pay down at once out of the first advance lent to him; so that in fact he gets into his pocket out of the 1010*l.* advanced to him, only 10*l.*, with the prospect of a further advance from the mortgagee of 640*l.* Then the operative part of the document provides as follows. [His Lordship read clause 1 of the deed and referred to clause 2, the proviso for redemption, and clause 4; he also read clause 5.] So it comes to this, that in effect the son is getting a monthly advance of 10*l.* up to 650*l.* If he does not, before the death of his mother, charge his property or become bankrupt, on her death he discharges his obligation by paying back the 650*l.* and nothing more, without interest or anything else. But if he goes bankrupt in the lifetime of his mother—I need not consider the other events—the mortgagee, the mother, can as against his trustee in bankruptcy claim not only the 1000*l.* (which was said to be retained to satisfy the bonus) but also the 10*l.*—the balance of the 1010*l.*; and also any other advances which may have been made up to the full 640*l.*, with interest at 5 per cent. So that, bankruptcy or no bankruptcy, on that depends what the mortgagee gets. If he goes bankrupt in her lifetime, she may get 1650*l.* with interest at 5 per cent.; if he does not go bankrupt in her lifetime, she only gets 650*l.*

Now it is said on behalf of the trustee that that arrangement is an obvious device for defeating the bankruptcy laws

and that it is bad. My attention has been called to two cases before the Court of Appeal. The first is *Ex parte Mackay* (1), where: "A. sold a patent to B. in consideration of B. paying royalties to A. B. at the same time lent A. 12,500*l.*; and it was agreed that B."—that is the mortgagee —"should retain one-half of the royalties, as they became payable, towards satisfaction of the debt." That is to say, the mortgagee got a security on half the royalties, but if the mortgagor went bankrupt, he got a security on the whole of the royalties. It was held: "That B. had a lien on one-half only of the royalties, and that the proviso that he might retain the whole of the royalties in case of A.'s bankruptcy, etc., was a fraud upon the bankruptcy laws, and void." James L.J. says he had entertained no doubt that there was a good charge upon one moiety of the royalties "because they are part of the property and effects of the bankrupt. But, on the other hand, it is equally clear to me that the charge cannot extend to the other moiety. If it were to be permitted that one creditor should obtain a preference in this way by some particular security, I confess I do not see why it might not be done in every case—why, in fact, every article sold to a bankrupt should not be sold under the stipulation that the price should be doubled in the event of his becoming bankrupt. It is contended that a creditor has a right to sell on these terms; but in my opinion a man is not allowed, by stipulation with a creditor, to provide for a different distribution of his effects in the event of bankruptcy from that which the law provides." Then Mellish L.J. says: "As I understand it, a person cannot make it a part of his contract that, in the event of bankruptcy, he is then to get some additional advantage which prevents the property being distributed under the bankruptcy laws." The other case of *Ex parte Williams* (2) was a somewhat more elaborate case, because there, there was a mortgage of certain smelting works to secure the repayment of an advance of 55,000*l.*, and it contained "a covenant by the mortgagee that, if the interest was punctually

(1) L. R. 8 Ch. 643, 647, 648. (2) 7 Ch. D. 138, 142, 143.

TOMLIN J. 1928 JOHNS, *In re.* WORRELL *v.* JOHNS.

paid as it became due, and all the covenants contained in the deed (other than the covenant for payment of the principal) were performed, and the mortgagor should not have become bankrupt or have taken proceedings for liquidation by arrangement or composition with his creditors, and should not have parted with the possession of the mortgaged property, and should not have ceased to carry on his business thereon, then the mortgagee would not for a period of five years require payment of the principal. And the mortgagor attorned tenant from year to year to the mortgagee in respect of the mortgaged property at the yearly rent of 20,000*l.*, to be paid half-yearly, on the days on which the interest on the mortgage debt was made payable." . . . . "It was admitted that the letting value of the property was not more than 3000*l.* per annum. Four months after the execution of the mortgage, the mortgager filed a liquidation petition, and the mortgagee afterwards claimed the right to distrain the chattels upon the mortgaged property for a year's rent under the attornment clause:—Held, that the arrangement was a mere device to give the mortgagee an additional security in the event of the mortgagor's bankruptcy, and was, therefore, in that event, void, as a fraud upon the bankrupt law, and that section 34 did not protect a distress levied for a mere sham rent." James L.J. says this (1): "It appears to me impossible to distinguish this case in principle from *Ex parte Mackay*." (2) Then he quotes a passage from Mellish L.J.'s judgment in *Ex parte Mackay* (2), and continues: "That is to say, as I understand it, a person cannot make it a part of his contract that, in the event of bankruptcy, he is then to get some additional advantage which prevents the property being distributed under the bankruptcy laws. In my opinion, looking at the whole scope and object of this deed, at the whole intention of the parties, and taking a common-sense view of the thing, it is impossible not to see that it was intended to make a different distribution of the property of the mortgagors according as they should or should not

(1) 7 Ch. D. 138, 142, 143. (2) L. R. 8 Ch. 643, 647.

become bankrupt. It was intended that, if they should become bankrupt, certain chattels which were not included in the deed should become an additional security to the mortgagee for his debt. It appears to me that the attornment clause was a mere sham, a mere contrivance and device to give the mortgagee an additional benefit in the event of the mortgagors' bankruptcy. That is an attempt to defeat the operation of the bankruptcy laws which cannot succeed."

Now what I have to do here is to consider the provisions of this particular mortgage deed and to come to a conclusion as to whether, having done so, I ought to apply the principle of those cases to which I have just referred. It seems to me plain, on an examination of this document, that what the parties actually intended to do was to secure to this son an advance or an allowance of 10*l.* a month up to the total figure of 650*l.*; and that that was to be secured to the mother, when making the advances. Now looking at the whole document, looking at the (if I may use the phrase, "usurious") terms on which the mother is advancing the money to the son, and to the fact that the amount which he actually gets in cash at the first advance is identical with the monthly advances which are to be made to him through the period of the advances; and, further, looking at the fact that, having regard to the proviso, there is no doubt that this result follows, namely, that if he becomes bankrupt in her lifetime she gets not only a substantial additional sum in corpus but also interest at 5 per cent. on the total money recovered out of the bankrupt's estate, whereas if he does not become bankrupt, she gets nothing from him, except a repayment of the actual monthly advances without interest, it seems to me reasonably plain that the scheme of that document is one which is to secure that something more shall come to her if he becomes bankrupt than if he does not; and that it falls exactly within the words in *Ex parte Williams* (1) that I have read: "A person cannot make it a part of his contract that, in the event of bankruptcy, he is then to get some additional advantage which prevents the property being

(1) 7 Ch. D. 138, 143.

TOMLIN J. 1928 JOHNS, *In re.* WORRELL *v.* JOHNS.

distributed under the bankruptcy laws." I read that as meaning not only the bankrupt cannot do that, but having regard to the position in that case of *Ex parte Williams* (1), the mortgagee cannot do it. He cannot make a bargain with the mortgagor which secures to him, the mortgagee, a greater advantage if the mortgagor becomes bankrupt than he would get if he does not.

I think the true inference to be drawn from the consideration of this document before me—just as the true inference was drawn in *Ex parte Williams* (1)—is that there is here a deliberate device to secure that more money should come to the mother, if the son went bankrupt, than would come to her if he did not; and, that being so, it seems to me that the device is bad.

So far I have only referred in detail to the first mortgage. There are two other mortgages. In the second, there is no bonus and the proviso there only relates to the non-payment of interest, but otherwise it is in the same form. In the third mortgage there is a bonus, and I think I may come to the conclusion that the same considerations applied to that as to the earlier deed. That being so, it seems to me that the mortgagee is only entitled to hold the share as security for the moneys actually advanced: but, it is said by the trustee in bankruptcy, without interest. That I fail to follow. If the bargain between the parties is bad as being in violation of the bankruptcy laws, it is the whole bargain in regard to those advances. It is not open to the trustee in my judgment to say: "I, the trustee in bankruptcy, am entitled to the benefit of the proviso under which 650*l.* without interest is to be demanded of the mortgagor in certain events, more especially as those events are not the events which occurred." It seems to me that the true view is that the bargain between the parties is bad as being in violation of the bankruptcy laws; and, therefore, the mortgagee is only entitled to be repaid the moneys actually advanced with interest at the rate of 5 per cent.

Solicitors: *Worrell & Fordyce; William Easton & Sons.*

(1) 7 Ch. D. 138, 143.

A. R. T.

TOMLIN J.

1928
June 7.

In re KIMBER.

VALE *v.* ROCKMAN.

[1927. K. 1015.]

Gift by Nomination—War Savings Certificates—Money on Deposit at Municipal Savings Bank—Power of Depositors to nominate—Limit of Amount capable of Nomination—Regulations—Modification of Regulations—Amount nominated exceeding statutory Limit—Application of statutory Provisions without expressly naming Act—Special Act—Application of Regulations—Savings Banks Act, 1887 (50 & 51 *Vict. c.* 40), *s.* 3—*War Loan (Supplemental Provisions) Act*, 1915 (5 & 6 *Geo.* 5, *c.* 93), *s.* 5—*War Loan Act*, 1918 (8 & 9 *Geo.* 5, *c.* 25), *s.* 2, *sub-s.* 4—*Birmingham Corporation Act*, 1919 (9 & 10 *Geo.* 5, *c. lxv.*), *s.* 11—*War Savings Certificates Regulations*, 1919, *regs.* 8, 28, 48 (*i*)—*Savings Banks Act*, 1920 (10 & 11 *Geo.* 5, *c.* 12), *s.* 4, *sub-s.* 1.

A., the holder of War Savings Certificates, nominated two of his daughters to be the recipients thereof pursuant to the statutory regulations. As, however, A. held more than the authorized number of certificates a sum was repaid, being amount of the value of the authorized holding, and a further small sum, being the amount in excess of the maximum. A. also had a sum of money on deposit at a municipal savings bank and which sum he also purported to nominate to the same two daughters under the regulations relating to deposits in savings banks.

A. died intestate, and an application was made by one of his next of kin for a declaration that the nominations were void on the ground (*a*) in the case of the War Savings Certificates, that as A. had held more than the permitted number, the power to nominate was void beyond the authorized holding; and (*b*) in the case of the money on deposit in the bank, on the ground that there was a limit as to nominations by depositors under the special Act of the particular corporation whose bank it was, and that even though by later regulations the corporation had purported to abandon this limitation, such a nomination was ultra vires the special Act and therefore void.

Both sums were therefore claimed as part of the deceased's general estate:—

Held, (1.) as regards the War Savings Certificates, that even though the regulations relating thereto did not expressly refer to the Savings Banks Act, 1887 (which dealt with nominations by depositors), or apply any of its provisions, yet a provision of the Act could be applied without naming it, and the regulations therefore in fact applied the provisions of the Savings Banks Act with modifications and were therefore intra vires.

Further, that even though the intestate's holding exceeded the authorized limit, yet by the special regulation relating to unauthorized persons holding certificates, the power to nominate might extend to the whole holding, subject to the liability of the person nominated to have such excess forfeited at the discretion of the Postmaster-General.

TOMLIN J.

1928

KIMBER, *In re.* VALE *v.* ROCKMAN.

The nomination by the intestate was therefore valid.

(2.) That as regards the money on deposit at the municipal savings bank, regulations as to nominations could be made by the corporation under their special Act similar to those indicated in the Savings Banks Act, 1887, with such modifications, including abolition of the maximum, as might be considered necessary, therefore the limit laid down could be abolished under these regulations and such abolition need not abrogate the whole matter. The nomination by the deceased was therefore good as to this sum also.

ORIGINATING SUMMONS.

Henry C. Kimber, of Balsall Heath, Birmingham (hereinafter called "the intestate"), died a widower and intestate on April 6, 1927.

The intestate had four daughters—namely, the plaintiff, Mrs. Florence E. B. W. Vale; the two respondents to the summons, Mrs. M. Rockman and Mrs. M. Fifer, and a fourth daughter—a half-sister to the plaintiff and respondents—who had not been heard of for many years and of whom no trace could be found. Letters of administration were granted to the respondent Mrs. M. Rockman on June 17, 1927.

Previous to his death the intestate held certain War Savings Certificates to the value of 574*l.* 17*s.* 4*d.* and a sum on deposit in the Birmingham Municipal Bank amounting to 257*l.* 14*s.* 4*d.* With regard to the War Savings Certificates the intestate, pursuant to the regulations, nominated the two respondents to be the recipients of the amount which he held. As, however, the deceased held 516 War Savings Certificates and the regulations relating to the holding of such certificates provided that no more than 500 certificates should be held by one person, the sum of 558*l.* 17*s.* 4*d.* was repaid in respect of 500 certificates and 16*l.* in respect of the repayment of the purchase price of the certificates in excess of the maximum.

The intestate had also in his lifetime further nominated the two respondents to be the recipients of the money standing to his credit in the Birmingham Municipal Bank, and such money had been duly paid out to them.

The plaintiff claimed as one of the next of kin under the Administration of Estates Act, 1925, to be entitled to a

one-fourth share of the intestate's estate; and with regard to the War Savings Certificates contended that as the regulations relating to such certificates had provided that not more than 500 should be held by any one person, and the intestate's holding was to the value of 572*l.* 16*s.* 6*d.*, the power to nominate could not extend to more than the authorized holding of 500, and the balance of 72*l.* 16*s.* 6*d.* therefore could not be nominated and formed part of the intestate's general estate.

She further contended with respect to the amount which the intestate held in the Birmingham Municipal Bank, that the regulations by which under their Act of 1919, the Birmingham Corporation dealt with nominations by depositors, only authorized such nominations to the extent of 100*l.*; and that the later abandonment by them of this limitation by subsequent regulations was ultra vires this Act of 1919; and the payment to the two respondents of the 257*l.* 14*s.* 4*d.* was therefore void, and this sum also formed part of the intestate's general estate.

W. A. Jolly for the applicant. The intestate affected to dispose of his interest in the 500 War Savings Certificates; and as the regulations have laid down (see regs. 8 and 28) that no person shall at any time hold or have any interest in certificates of a greater nominal amount than 500, his disposition is void. These regulations did not incorporate the Savings Banks Act, 1887, s. 3, which relates to nominations, and therefore are ultra vires, as they do not in terms refer to the Act of 1887. They do not apply any provision of the Act which it is submitted is required: War Loan (Supplemental Provisions) Act, 1915, s. 5.

With regard to the money in the Birmingham Municipal Bank, similar considerations apply. The regulations made by the corporation are ultra vires their special Act of 1919. There is a "modification" in the regulations of 100*l.*; it is submitted a limit must be given to the word "modification," and if the 100*l.* limit is altogether left out, there is nothing left: it is an abrogation of the whole matter.

TOMLIN J.
1928
KIMBER, *In re.* VALE *v.* ROCKMAN.

L. W. Byrne for the respondents. On the question of the War Savings Certificates, the nomination by the intestate is valid for the whole amount. It is not necessary to explicitly name an Act to imply its provisions.

With regard to the sixteen extra certificates, one must look at reg. 48 of the War Savings Certificates Regulations, 1919. As to the money on deposit in the municipal bank, these nominations are also valid.

W. A. Jolly in reply.

TOMLIN J. [dealt first with the question of the War Savings Certificates:] The short point on this question appears to me to be as follows. The intestate subscribed to War Savings Certificates—he seems to have subscribed to more than 500—516 in fact, and he affected to nominate, under the regulations of 1919 relating to War Savings Certificates, which are made pursuant to the statutes—namely, the War Loan (Supplemental Provisions) Act, 1915, as amended by the War Loan Act, 1918—the respondents as the persons entitled to receive the money. After his death the persons nominated, in fact received the money; they received 558*l.* 17*s.* 4*d.* in respect of the 500 certificates, and so far as the sixteen certificates in excess of the 500 were concerned, the Postmaster-General repaid them at their face value. It is said on behalf of the next of kin that the nomination was not good, because of a somewhat technical and subtle point. By the War Loan (Supplemental Provisions) Act, 1915, under which the certificates are issued, s. 5, which was later modified by the War Loan Act, 1918, s. 2, sub-s. 4, provides: "Where any money which may be raised under the War Loan Act, 1915, is raised through the Post Office, the Treasury may make regulations as to the manner in which and conditions under which the money may be raised, and may by those regulations apply any provisions of any Act, including this Act, relating to deposits in savings banks, with such modifications as appear necessary or expedient." The War Loan Act, 1918, s. 2, sub-s. 4, which seems to have modified this section to some extent, is as follows: "Section

five of the said Act shall have effect, and shall be deemed always to have had effect, as though there were inserted therein after the words 'under the War Loan Act, 1915,' the words 'or under any subsequent Act authorising the raising of any money for the purpose of the present war,' and as though for the words 'relating to deposits in savings banks,' there were substituted the words 'relating to the Post Office, to savings banks, to the Post Office register, or to any other matter under the administration of the Postmaster-General, or of any regulations made under any such Act.'" Under the Savings Banks Act, 1887, s. 3, regulations made in pursuance of the Act may provide, amongst other things, (*a*) "for the nomination by a depositor not being under sixteen years of age of any person or persons to whom any sum or sums not exceeding in the aggregate one hundred pounds payable to such depositor at his decease (including any portion of any annuity or accrued interest payable to the representatives of such depositor) is or are to be paid at such decease," and there are a number of other provisions with regard to nomination. When regulations came to be made under the War Loan Acts of 1915 and 1918 (and those regulations are to be found in the War Savings Certificates Regulations of 1919), the persons responsible for the drafting of the regulations did not say when drafting them that the provisions of the Savings Banks Act, 1887, were to apply, "with the following modifications," but without mentioning the Savings Banks Act, 1887, set out the provisions as to nominations, which were in fact intended to apply; and therefore it is said that those regulations are ultra vires, because they are not regulations which apply a provision of the Savings Banks Act, 1887. I think, however, you may apply a provision of the Act without naming it, and I think that what these regulations in fact have done is to apply the provisions, or some of the provisions, of the Savings Banks Act, 1887, with modifications, and in so doing the framers of them have been acting intra vires. I think, therefore, that the provision as to nominations in these regulations is good, and that the nominations which were

TOMLIN J. 1928 KIMBER, *In re.* VALE *v.* ROCKMAN.

made by the intestate in respect of his War Savings Certificates are also good, and the respondents are entitled to the whole, subject only to the next small point which has to be considered, and that is this. It is said that inasmuch as under the regulations you are not entitled to hold more than 500 certificates, there could not be any nomination for anything more than 500; and therefore the nomination in regard to the sixteen surplus certificates is bad; so that the sum of 16*l.* is involved in this question. When I look at the regulations, I find in fact under reg. 48 (1.) the following—namely: "If any person not entitled under these Regulations so to do shall purchase or hold or have any interest in a certificate the nominal amount of such certificate shall be liable to be forfeited either as to the whole thereof or to such extent and in such manner as the Postmaster-General may think just in the circumstances of the case." It seems to me the effect of that is this, that where a holder is holding more than 500 certificates, it is at the option of the Postmaster-General to forfeit the surplus or to pay them if he thinks proper so to do and if he thinks it fair in the circumstances. That being so, it seems to me plain that the power to nominate extends to all the certificates which the holder may have. No doubt the person nominated is liable, if he holds certificates in excess of the 500, to have them forfeited under the provisions of the regulations; but I do not think that the nomination is bad in excess of the 500, and I hold, therefore, that this nomination in regard to the whole of the 516 certificates is good.

With regard to the further question relating to the 257*l.* 14*s.* 4*d.*, the point here is this. The intestate apparently had this sum of money on deposit at the Birmingham Corporation Municipal Bank, and he affected again to nominate the respondents as the persons entitled to receive it. It is said again that that is a bad nomination and does not take effect, and that the money remains part of the intestate's estate. It is contended that that is so because the regulations, which have been made by the corporation, with the approval of the Treasury, under the Birmingham Corporation Act, 1919, s. 11, are ultra vires.

Those are the only regulations or sections under which any nomination could be made. By the Birmingham Corporation Act, 1919, s. 11, it is provided: "The Corporation may establish and maintain a savings bank and may receive at that bank deposits and may guarantee the payment of interest on and the repayment of such deposits subject however to the following conditions—(1.) The accounts of the bank shall be kept separate from all other accounts of the Corporation, (2.) the bank shall be carried on in accordance with such regulations as the Treasury or the Corporation with the approval of the Treasury may prescribe. The regulations to be prescribed under this section may apply, with or without modification, any of the provisions (including penal provisions and any provisions granting exemption from stamp duty in respect of instruments and documents) contained in the enactments relating to savings banks, but save as applied by the regulations those enactments shall not apply to the bank." The Savings Banks Act, 1887, s. 3 (*a*), lays down: "The regulations made in pursuance of this Act may also provide— . . . ." [His Lordship read the part of the section which he had previously read as stated above.] There are other provisions in the section in regard to nomination.

Now the corporation, with the approval of the Treasury, have made regulations applying similar provisions with modifications, and one of the modifications is that a limit of 100*l.* is imposed. As I understand the argument it is this, that the 100*l.* limit is so much of the essence of these provisions in regard to nomination that to strike out the 100*l.* limit is not a modification, but is something in the nature of an abrogation of the whole matter; it goes to the root of the tree, and if you strike out the maximum, the result is really that you have no system which you can apply. That is how I understand the argument. As a matter of language, upon the construction of the Birmingham Corporation Act, 1919, s. 11, I do not think that that argument is well founded. It seems to me plain that the language employed, according to its ordinary meaning, really does enable the corporation, with

TOMLIN J.
1928
KIMBER, *In re.* VALE *v.* ROCKMAN.

the approval of the Treasury, to make regulations as to nominations similar to those indicated in the Savings Banks Act, 1887, with any modification, including the abolition of the limit, as they may think fit. I am satisfied that that is the natural meaning of the language, and that it is not such a remarkable or disastrous provision as Mr. Jolly has tried to persuade me to believe, is borne out and comfort is afforded to me by the Savings Banks Act, 1920, s. 4, sub-s. 1, under which the limit in the Act of 1887 for the Post Office Savings Bank was actually abolished, and the state of affairs obtaining in regard to the Birmingham Bank is therefore identical with the state of affairs obtaining, so far as this matter is concerned, in regard to the Post Office Savings Bank. That being so, I think the claim fails, and the respondents are also entitled to retain the money which they have drawn under this nomination.

Solicitors: *Foster Grave & Jay, for Philip Baker & Co., Birmingham; Tiddeman & Marshall, for Bailey Cox & Co., Birmingham.*

A. R. T.

CLAUSON J.
1926
Oct. 26, 27.

SUNDERLAND CORPORATION *v.* GRAY.

[1925. S. 4628.]

Local Government—Street—Notice to sewer, pave, etc.—Omission to serve a Frontager—Effect of Omission on Liability of Frontagers served—Recovery of Expenses by Local Authority—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257.

Notwithstanding omission to serve notice under s. 150 of the Public Health Act, 1875, on one of the frontagers, those frontagers who have been served are still liable under the Act, proportionately according to the frontage of their respective premises, for the expenses of executing the works required by the notice, to the extent that the same relate to those portions of the street upon which the premises of those frontagers abut, but no further.

The view expressed by Kekewich J. in *Handsworth District Council* v. *Derrington* [1897] 2 Ch. 438, 449 as to the effect of such an omission upon the liability of frontagers served, dissented from.

ORIGINATING SUMMONS.

On June 13, 1923, the council of the borough of Sunderland passed a resolution adopting a report of the highways and

street lighting committee in pursuance of which and of s. 150 of the Public Health Act, 1875, they served on the owners or occupiers of the premises fronting, adjoining or abutting on certain parts of Thornhill Terrace, Sunderland, including the defendant Gray, notices requiring them to execute certain works therein mentioned upon the portions of Thornhill Terrace upon which their premises respectively abutted. The notice to the defendant was dated December 11, 1925, and was addressed to him as the owner of the premises No. 23 Thornhill Terrace abutting on that street. The notice, after reciting that the street was not paved, etc., to the satisfaction of the local authority and that his premises abutted on certain parts of the street which required to be paved, made good, etc., required that the defendant should within two months from the date thereof sewer, level, pave, etc., that portion of the street on which his premises fronted, adjoined or abutted according to the plans and sections which had been prepared and deposited for inspection at the office of the plaintiffs.

The notice not having been complied with, the corporation themselves executed the works referred to in the notice; the expense thereby incurred being 1898*l.* 6*s.* 10*d.*

Under s. 150 the apportionment amongst the various frontagers is to be settled by the borough surveyor or by arbitration; and in the present case it was the intention of the parties to have the apportionment made by arbitration. Under that section notices are required to be served on all the frontagers upon the street required to be made up; but in the present case the corporation omitted to serve a notice upon one Thompson, who was the owner of premises fronting upon the street in question.

The summons was taken out by the corporation asking for a declaration that the sum of 30*l.* 2*s.* 3*d.*, being the duly ascertained proportion payable by the defendant, as the owner of No. 23 Thornhill Terrace, of the expenses incurred by the plaintiffs under s. 150 of the Public Health Act, 1875, in sewering, flagging, paving, etc., No. 23 Thornhill Terrace, were, together with interest at 5*l.* per cent. from October 19,

CLAUSON J. 1926 SUNDERLAND CORPORATION v. GRAY.

1925, the date of the demand for payment, and the costs of the action were by virtue of s. 257 of the Act a charge on the defendant's premises No. 23 Thornhill Terrace, and to have such charge enforced.

It was contended by the defendant that the notice so served upon him was of no effect on the following grounds: first, that the period of two months, which was the time stated in the notice within which the defendant was required to execute the work, was insufficient; secondly, that the length of time to be allowed had not been properly considered by the corporation; and thirdly, of the omission to serve a notice on the frontager named Thompson in respect of his premises. The third ground of objection to the validity of the plaintiffs' notice is for the purposes of this report the only material one.

R. M. Montgomery K.C. and *H. C. Bischoff* for the plaintiffs. The omission to serve a notice on one of the frontagers did not render the notice on the defendant abortive. True that Kekewich J. in *Handsworth District Council* v. *Derrington* (1) said it was a condition precedent that under s. 150 notices should be served on every frontager. But that amounted only to a dictum, seeing that it was there held to be too late for the defendant to take that objection.

Konstam K.C. and *A. Hildesley* for the defendant. The omission to give notice to one of the frontagers rendered the other notices bad. Frontagers ought not to be deprived of the opportunity of arranging together to execute the works themselves which they might be able to do at a less expense than the local authority, so that the omission to give notice may result in a grievance to those frontagers who have been served with notice. At the worst, those frontagers can only be made liable for the expenses of making up so much of the street as abuts upon their own premises.

CLAUSON J. [after stating the facts and holding that the first and second objections raised by the defendant failed, continued:] I now come to the real and by no means easy point in this case. The defendant contends that s. 150

(1) [1897] 2 Ch. 438.

must be taken, at least impliedly, to provide that before a frontager can be charged with his proportion of the expense of making up a street, the local authority must give notice in accordance with this section to all the persons who are frontagers upon this street, and that, if they omit to give notice to one of the frontagers for whatever reason, the section does not come into operation at all, and no advantage can be taken of the section by the local authority. The authority in favour of this contention is the opinion to that effect of Kekewich J. as expressed in *Handsworth District Council* v. *Derrington*. (1) But his Lordship's opinion was not reflected in the order he made, because he held, for reasons I need not go into, that the point could not in that case be raised; and, accordingly his Lordship's opinion did not result in a decision that was susceptible of an appeal. An actual decision of the point is, however, now inevitable.

The proceeding here is one in which a charge is claimed; and it is claimed under s. 257 of the Public Health Act, 1875. I need not read that section at length, because the charge is there given in respect of sums for which the owner of the premises is made liable under s. 150. Therefore, for the purpose of considering whether a charge can be claimed here, it will be sufficient for me to turn to s. 150 and see whether under the terms of s. 150, the defendant is in fact liable for the sums in question. [His Lordship then read the section, and continued:] On this section first of all it appears—in fact it was decided many years ago—that no owner can be made liable for any portion of these expenses, unless he has had a notice served upon him; and, accordingly, taking this particular case where one frontager—namely, Mr. Thompson—did not receive a notice, it is plain that Mr. Thompson cannot be charged under this section, but I see no reason to doubt that it is open to the local authority to charge any frontager with his proper proportion of the expense incurred in making up such parts of the street as abut upon the houses of those frontagers to whom notices have been given under this section. I see nothing in the

(1) [1897] 2 Ch. 438, 449.

CLAUSON J.
1926
SUNDERLAND CORPORATION v. GRAY.

language of the section to occasion any difficulty. The notice to each frontager is clearly confined to the part of the street which abuts upon his premises. Provided that the sum which is apportioned between the various persons who are to be charged is the sum and only the sum, which was incurred in making up the portion of the street which abutted on the premises of the various owners to whom notice was given, there seems to be no injustice in so charging those persons, notwithstanding that there may happen to be a frontager somewhere in the street to whom no notice has been given and who accordingly cannot be charged. As far as the language is concerned I see no difficulty. There is, however, this difficulty (and it is the point which impressed Kekewich J., and on which he, no doubt, grounded his opinion), that the section deals, as a whole, with the street or the part of a street which the local authority intend to repair: but I see no difficulty in holding that, if they do not take the proper steps to bind every frontager, the only result is that they do not obtain a charge or liability in respect of the particular portion of the expense attributable to the part of the street to be repaired which abuts on the premises of any frontager who is not bound. It was suggested by counsel for the defendant that the résult of that may be that if the local authority has made a mistake and omitted a frontager, but nevertheless repairs the whole street, including the bit opposite that particular frontager's house, and pays the expense out of the general district rate, they will be doing something that is unlawful, and it may be by proper proceedings some surcharge could be made. Be that as it may, I do not see how that affects the position. Of course, the same thing will occur if, owing to the omission to serve one frontager, the notices on all the other frontagers are, upon the proper construction of the section, ineffective, so that nobody can be charged with any part of the expenses of this work at all. In such a case the local authority is in still a worse position on that construction of the Act. However that may be, I do not feel I am called upon to place on this section a construction which would have the effect of freeing, if I may

take the actual names in this case, Dr. Gray (the defendant) from bearing his proper proportion of the expense simply because Mr. Thompson, with whom the defendant has no concern at all, has not been served with the notice and therefore may be fortunate enough to escape from having to bear his own share of the expenses.

There is a further point. It appears from the evidence that the sum which the plaintiffs are seeking to charge on the defendant's property was arrived at by taking the expenses which are to be apportioned amongst the frontagers at a figure of 1898*l.* 6*s.* 10*d.*, which represents the expense of doing not only the work opposite the houses of the frontagers on whom notices have been served, but also the work opposite to Mr. Thompson's property. That being the case, it appears to me that the calculation on which the claim is founded is wrong, and that the local authority must find out the expense incurred by them in doing the work mentioned or referred to in the aggregate of notices, that is to say, they have to find out how much the work cost which was done in respect of the portion of the street on which those properties abut which belong to persons on whom notice was served. That figure is admittedly not 1898*l.* 6*s.* 10*d.* Having regard to certain apportionments which have been made, I do not feel much doubt that the right figure would be about 1880*l.*, but I have not, strictly speaking, the material before me to ascertain the figure, and unless the plaintiffs and the defendant agree the figure, it must be ascertained by inquiry.

As regards the actual apportionment, I understand the parties are agreed that it is to be done in case of dispute by arbitration.

What then is the right order for me to make upon this summons in the view that I take of the construction of the Act? Neither the plaintiffs nor the defendant are quite right. The plaintiffs started the proceedings prematurely, because there has been no apportionment, and until there has been an apportionment by arbitration, the figure of 30*l.* 2*s.* 6*d.* which is mentioned in the summons, cannot strictly be ascertained. I propose to direct an inquiry what

CLAUSON J. 1926 SUNDERLAND CORPORATION v. GRAY.

is the amount of the expenses incurred by the plaintiffs in executing the works referred to in the notice served on Dr. Gray upon the parts of Thornhill Terrace upon which the premises abut which were owned or occupied by the several persons upon whom notices were served by the plaintiffs under s. 150 of the Public Health Act, 1875, before the commencement of the works. That will bring out a figure which, I think, will probably be found to be somewhere in the neighbourhood of 1880*l.* The costs of the inquiry will be reserved. There will also be a declaration that such proportion of the amount to be ascertained by the inquiry as is settled by the surveyor of the plaintiffs or, in case of dispute, by arbitration is charged under s. 257 of the Public Health Act, 1875, together with such interest as therein mentioned upon No. 23 Thornhill Terrace. There will be no order as to the costs of this summons up to and including the hearing.

Solicitors: *Sharpe, Pritchard & Co., for H. Craven, Town Clerk, Sunderland; Crossman, Block, Matthews & Crossman, for Hedley & Thompson, Sunderland.*

H. C. H.

MANCHESTER CORPORATION *v.* AUDENSHAW URBAN DISTRICT COUNCIL AND DENTON URBAN DISTRICT COUNCIL.

C. A. 1928

June 7, 8, 11, 12.

[1926. M. 6105.]

Highway—Maintenance—Increase of Traffic—Deterioration of Road made under Specification of local Act—Measure of Liability—Standard of Repair—Manchester Corporation Waterworks and Improvement Act, 1875 (38 & 39 *Vict. c. clxi.*), *s.* 14, *sub-s. ii.*

Under the provisions of a local Act of 1875 the Manchester Corporation was authorized to make a new road lying within the districts of the two defendant Councils, such road to be "at all times thereafter maintained" at the expense of the Corporation, and to be of the dimensions, character, and composition therein expressly specified. The work was done according to all the requirements and provisions of the Act and the road was completed in April, 1878, as a waterbound macadamized road. At that date and for many years afterwards the road amply sufficed for the slight traffic thereon, and was maintained at the expense of the Corporation. From 1914 onwards the traffic increased enormously in weight and volume, so that the road began to deteriorate and was now in a state of serious disrepair.

Eve J. held, applying *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *Attorney-General* [1915] A. C. 654, that the plaintiffs were only liable to maintain the road in the state in which it was at the date of its completion in 1878, but gave leave to the defendants to apply for an inquiry as to any contribution which they might allege ought to be made by the plaintiffs to the costs of reconditioning the road and generally.

On appeal by the defendants:—

Held, applying *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *Attorney-General* [1915] A. C. 654; *Attorney-General for Ireland* v. *Lagan Navigation Co.* [1924] A. C. 877; and *Attorney-General* v. *Great Northern Ry. Co.* [1916] 2 A. C. 356, that the plaintiffs were liable under the Act of 1875 to maintain the road in the state in which it was at the date of its completion in 1878, and that that liability still continued notwithstanding the change of circumstances brought about by the increase of traffic.

Held, also, that inasmuch as the road had not been taken over by the defendants, the defendants had no power to maintain it, but the obligation to do so rested on the plaintiffs alone.

Held, therefore, that Eve J. was wrong in granting the defendants leave to apply for the inquiry above mentioned and that his order must be varied by omitting it.

Appeal from a decision of Eve J. (1)

The defendant Councils were the highway authorities within their respective districts and the successors of the

(1) Ante, p. 127.

C. A. 1928

MANCHESTER CORPORATION v. AUDENSHAW URBAN COUNCIL AND DENTON URBAN COUNCIL.

Audenshaw and Denton Local Boards. The Manchester Corporation were the waterworks undertakers for the city of Manchester and surrounding areas. For the purposes of constructing reservoirs in the districts of the two defendant Councils the Manchester Corporation obtained certain powers under the Manchester Corporation Waterworks and Improvement Act, 1875. The construction of these reservoirs necessitated the covering of part of the site of a road known as Taylor Lane, which was partly in the districts of these two Councils, and the Corporation were authorized by the Act to construct a new road to be substituted for part of Taylor Lane. By s. 14, sub-s. ii., of the Act it was provided that the new road so authorized should be at all times thereafter maintained by and at the expense of the Corporation and should be made of the width of 14 yards, inclusive of a stone boundary wall to be erected by the Corporation on each side fencing such road off from the adjoining lands, and should have a footway of not less than 7½ feet wide on each side, to be made with a rubble or cinder foundation and gravel cover of not less than 12 inches in depth altogether, and with curb stones ; the carriage-way of the said road should be macadamized, the foundation thereof to be rubble 6 inches in depth covered with hard macadam to the depth of at least 12 inches. Provision was made by sub-s. iii. for the making and maintaining of a main sewer under the new road. By sub-s. iv. of the same section it was provided that the new road should not be deemed to be completed until it should have been made and sewered in accordance with the foregoing provisions of the Act, and to the reasonable satisfaction of the Audenshaw and Denton Local Boards respectively. The said new road was made and completed about April, 1878, to the satisfaction of the two local boards, and was known as Corporation Road. At first and for many years afterwards the traffic on this road was of a very limited amount, being confined to foot passengers and horse-drawn vehicles. During this period the road was repaired by the Corporation at a small annual cost, and was amply fit for the traffic. During recent years the traffic had enormously

increased and was of an entirely different character from the traffic when the road was made. The effect of the increased traffic, especially of a number of heavy and fast motor vehicles, had caused great damage and injury to the road, the construction of which was entirely unsuitable for the present day traffic. The plaintiffs alleged that the defendant Councils contended that the plaintiffs were liable under the Act of 1875 from time to time to construct and reconstruct, and maintain and keep in repair the said road in manner suitable for the requirements of the traffic for the time being using the said road. The plaintiffs, while ready and willing to discharge their obligations under the Act, maintained that they were only liable under s. 14, sub-s. ii., of the Act to maintain the road in the condition it was in when it was made and completed in April, 1878. The plaintiffs issued their writ on November 30, 1926, and by clause 1 of the prayer of their claim asked for a declaration to that effect. The defendants by their defence referred to other sections of the Act, including s. 11, under which the Corporation were authorized to make, construct, lay down and maintain the several works therein described including No. 22, a road commencing in Taylor Lane in the position and of the length therein specified, being the new road specified in the statement of claim. They also referred to ss. 13 and 14, sub-s. ix., and submitted that the carriage-way of the road had not been and was not now being properly "maintained" by the plaintiffs and was in a bad state of repair. They contended that the plaintiffs were under an obligation to maintain the carriage-way of the road in a fit state to bear the ordinary traffic thereon at the present day, and they counterclaimed to have a declaration in those terms. Further, in the alternative they asked for a declaration that the plaintiffs were under an obligation at all times to maintain a macadamized carriage-way, the foundations thereof to be rubble 6 inches in depth, covered with hard macadam to a depth of at least 12 inches; and that such obligation existed whatever might be the nature of the ordinary traffic thereon at the present day.

C. A. 1928

MANCHESTER CORPORATION v. AUDENSHAW URBAN COUNCIL AND DENTON URBAN COUNCIL.

The action was tried by Eve J. with witnesses on July 19, 20; October 17, 18, 19, 20 and 21, 1927.

On November 16 his Lordship in a considered judgment held, applying *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *Attorney-General* (1), that the plaintiffs were only liable to maintain the road in the state in which it was at the date of its completion in 1878. He accordingly made a declaration in the terms of para. 1 of prayer of the plaintiffs' statement of claim and dismissed the defendants' counterclaim, but gave leave to the defendants to apply for an inquiry as to any contribution which they might allege ought to be made by the plaintiffs to the cost of reconditioning the road and generally.

The defendants appealed. The appeal was heard on June 7, 8, 11 and 12, 1928.

Joshua Scholefield K.C. and *H. A. Hill* for the appellants. The appellants submit the following propositions: (1.) The word "maintain" in s. 14, sub-s. ii., of the Act of 1875 includes the amelioration of the road, and this can be effected by tar spraying and the road thereby maintained. (2.) If there is no obligation to tar spray and therefore the road would perish at the end of every five years after repair the plaintiffs cannot say that circumstance absolves them from their statutory obligation to maintain the road, because (*a*) extra expense is no answer; (*b*) they cannot say that it would be wasteful and extravagant, as admittedly by using modern methods they could overcome the difficulty; (*c*) no question of wastefulness is open to plaintiffs, as it is not raised by the pleadings. (3.) Sect. 14, sub-s. ii., of the Act means that the road there described as Road 22 shall at all times be maintained by the plaintiffs and their obligation is in no way cut down, because at the end of the section nature of the construction of the road is specified.

In *Sevenoaks, Maidstone and Tonbridge Ry. Co.* v. *London, Chatham and Dover Ry. Co.* (2) Jessel M.R. in dealing with the meaning of the words "works of maintenance" said: "It

(1) [1915] A. C. 654. (2) (1879) 11 Ch. D. 625, 634.

is very difficult to define what works of maintenance are. It is a very large term, and useful or reasonable ameliorations are not excluded by it." That statement was approved of in *Leek Improvement Commissioners* v. *Stafford Justices* (1), where it was held that maintenance meant repairs. In *Sandgate Urban Council* v. *Kent County Council* (2) the House of Lords held that whatever was necessary for the preservation of the road was maintenance. In *Reigate Corporation* v. *Surrey County Council* (3) the maintenance and repair of the walls and roof of a tunnel through which a road passed were held necessary to the maintenance of the road. These cases show that where a road has to be maintained by a local authority everything that is necessary for that purpose must be done by it : see also the observations of Fletcher Moulton L.J. in *Lurcott* v. *Wakely & Wheeler*. (4)

Against the defendants' contention that the plaintiffs are liable to make the road fit to bear modern traffic the plaintiffs contend that the standard of repair to be observed by them is that laid down by the House of Lords in *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *Attorney-General* (5)—namely, the condition in which the road was when it was completed in 1878. In that case the House of Lords reversed the decision of the Court of Appeal (6), who had held that the standard in that case to be observed was the standard of the present traffic, and they restored the decision of Phillimore J. (7) But even if this were so the plaintiffs would still remain liable to do the repairs. Eve J., by inserting in his order liberty for the defendants to apply for contribution from the plaintiffs, appears to have treated the defendants as under a liability to recondition the road so as to cope with modern conditions, and his judgment also suggests that this is what he thinks should be done. It is contended that the defendants are under no

(1) (1888) 20 Q. B. D. 794.
(2) (1898) 79 L. T. 425, 427.
(3) Ante, p. 359.
(4) [1911] 1 K. B. 905, 916.
(5) [1915] A. C. 654.
(6) [1914] 3 K. B. 1.
(7) [1913] 1 K. B. 422.

C. A. 1928

MANCHESTER CORPORATION v. AUDENSHAW URBAN COUNCIL AND DENTON URBAN COUNCIL.

such liability. Even if the plaintiffs are not, on the construction of the Act of 1875, liable to do more than to make up the road to the old standard in 1878, the liability would continue to be theirs to make it up as fast as it fell into disrepair, and the defendants are under no liability to repair it seeing that they have never taken it over. This is not a case like *Scott* v. *Brown* (1), where the covenantor's liability was only to contribute. It is really sufficient for the defendants to have less relief than was asked for in their counterclaim. They will be content if the order is varied by striking out the provision for an inquiry and the order dismissing the counterclaim, and by omitting from the existing declaration the word "only."

Sir Herbert Cunliffe K.C. and *John Bennett* for the respondents. The defendants are seeking to depart from the line taken by them in their counterclaim. Their case was that it was useless to put the road back into the condition it was in 1878 and that the plaintiffs were under an obligation to reconstruct the road so as to be fit for present day traffic. Eve J. held that the plaintiffs were under no such liability, and that, as it was useless to restore the road to its 1878 condition, it was for the defendants to recondition the road and receive a contribution from the plaintiffs. The road in question is admittedly a public highway, and the defendants, the District Councils in whose areas it is, have a right to go on to it and repair it. That might, it is true, result in the road becoming repairable by the inhabitants at large; but, to escape any such technical difficulty, the plaintiffs are and always have been willing to enter into an agreement with the defendants to contribute their proper quota: see Public Health Act, 1875, s. 148. The same result could be obtained by a scheme under the Private Street Works Act, 1892. This is not a case where the work requiring to be done to the road falls within the obligation to maintain. The effect of the heavy motor traffic has been (as Eve J. found) to grind out the core of the road. The only obligation of the plaintiffs is to repair; but to put the road right now would involve

(1) (1904) 69 J. P. 89.

scarifying it to a depth of several inches in a manner unknown in 1878. Mere surface repairs would be useless.

[LORD HANWORTH M.R. Eve J. finds that if the road were made up to the 1878 standard it would rapidly deteriorate; but that may only result in the plaintiffs having to repair it at very frequent intervals.]

Eve J. did not intend to throw this burden upon the plaintiffs. If all that the defendants want is to have the liberty to apply for an inquiry struck out, the plaintiffs would have no objection to this being done. The liberty is a liberty for the defendants, and not the plaintiffs.

[LORD HANWORTH M.R. The result would be that the plaintiffs would have to repair the road and keep it in repair, however frequently its rapid deterioration made that necessary.]

That was not Eve J.'s intention nor was it what the plaintiffs asked for; but if that is the construction to be put on the order, as it is proposed to vary it, it becomes necessary to contend on behalf of the plaintiffs that the liability to do any repairs ceased when the traffic on the road became of a different character: see *Attorney-General for Ireland* v. *Lagan Navigation Co.* (1)

[RUSSELL L.J. The plaintiffs have not appealed from the order of Eve J., and the declaration made was that which they themselves asked for.]

The plaintiffs only seek to raise this question now because a construction is being put on the declaration, which (as they submit) was never intended. The true view surely is that the burden of reconditioning the road is on the highway authorities, except so far as any portion of the expense may be placed on the plaintiffs by the Act of 1875: compare *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *Attorney-General* (2), where the limits of liability imposed in a case like the present are made plain. The injury to the road here goes beyond anything that can be remedied by mere repairs and is caused by vehicles of a size and velocity not contemplated when the road was made.

(1) [1924] A. C. 877. (2) [1915] A. C. 654, 666, 668.

C. A. 1928

MANCHESTER CORPORATION v. AUDENSHAW URBAN COUNCIL AND DENTON URBAN COUNCIL.

It is submitted therefore that the plaintiffs' liability to do any repairs has ceased.

Joshua Scholefield K.C. was not called upon to reply.

LORD HANWORTH M.R. This is an appeal from a decision of Eve J. given on November 16 of last year. The Manchester Corporation were the plaintiffs, and the defendants were two urban district councils, the Audenshaw Urban District Council and the Denton Urban District Council, in the neighbourhood of Manchester. The Manchester Corporation are the waterworks undertakers for the city of Manchester and several surrounding areas. The two defendant Councils are the highway authorities for their districts and the successors of the Audenshaw and Denton Local Boards referred to in the Act of Parliament which has to be construed. Many years ago the Corporation obtained powers under the Manchester Corporation Waterworks and Improvement Act, 1875 (38 & 39 Vict. c. clxi.), for the purpose of constructing reservoirs in the Audenshaw and Denton districts. At that time in the district in which they were minded to complete these reservoirs there was a road known as Taylor Lane, partly within the district of Audenshaw, and partly within the district of Denton, and repairable by the frontagers abutting upon it ratione tenurae. The Corporation wanted to get rid of that road and to submerge it, because the land on which it stood would be a part of the reservoir.

The Corporation obtained the powers which they sought under this private Act of 1875, which is now before us. Sect. 11 of that Act provides that: "Subject to the provisions of this Act, the Corporation may make, construct, lay down, and maintain, in the situation and lines, and according to the levels shown on the deposited plans and sections relating thereto, and in and upon the lands described upon such plans, the several works hereinafter described," and item 22 of that section is this: "A road commencing in the road called Taylor Lane, at a point measured two hundred and twenty-six yards or thereabouts in a south-easterly direction along the said lane from the centre of the bridge carrying the said

lane over the Stalybridge and Stockport branch of the London and North-Western Railway, and terminating in Cock Lane at the bridge carrying the said lane over the said branch railway." That was a right to construct a road in lieu of Taylor Lane. They obtained the power to submerge Taylor Lane, and to build this new road in the place of it. Sect. 14, which was referred to in s. 11 in this sense, that the powers already given to the Corporation as to Taylor Lane were subject to the provisions of this Act, contains provisions which are germane to Taylor Lane and the new road. It provides this in sub-s. ii.: "The new road hereinbefore authorised and described on the deposited plans as 'intended diversion of road No. 22,' shall be at all times hereafter maintained by and at the expense of the Corporation, and shall be made of the width of fourteen yards, inclusive of a stone boundary wall, to be erected by the Corporation on each side, fencing such road off from the adjoining lands, and shall have a footway of not less than seven and a half feet wide on each side, to be made with a rubble or cinder foundation and gravel cover of not less than twelve inches in depth altogether, and with curb stones. The carriageway of the said road shall be macadamised, the foundation thereof to be rubble six inches in depth, covered with hard macadam to the depth of at least twelve inches."

In one part of the argument attention was called to the fact that if you look at sub-s. i. and contrast it with sub-s. ii., you will find that in sub-s. ii.—which is the one I have just read, and the relevant one—there is a duty imposed upon the Corporation at all times hereafter to maintain this new road by and at the expense of the Corporation, and there are no words which possibly might be construed as words of some limitation as there are in sub-s. i., where it is provided, as to the maintenance of the intended diversion of road No. 21, that it is to be "used for the same purposes, and shall be subject to the same rights of way, passage or otherwise, as the portion of Debdale Lane."

I only refer to that argument because it has not been fully developed before us, but it is noticeable with regard to this

C. A. 1928

MANCHESTER CORPORATION v. AUDENSHAW URBAN COUNCIL AND DENTON URBAN COUNCIL.

Lord Hanworth M.R.

road No. 22 that there is a liability on the Corporation to make it of certain dimensions and in a particular way, and to maintain it. There are no words which could be construed as in any way cutting down that plain duty of maintenance which is imposed by s. 14, sub-s. ii.

Under sub-s. iv. of the same section (s. 14) the provision is made in this way: "The last-mentioned new road shall not be deemed to be completed until it shall have been made and sewered in accordance with the foregoing provisions, and to the reasonable satisfaction of the Audenshaw and Denton Local Boards respectively, and the Corporation and the said local boards, or either of them, may from time to time enter into agreements with respect to the adoption of so much of the said road and sewer, or any part or parts thereof respectively, as shall be within the respective district of such boards as a highway and sewer, repairable by the inhabitants of the said district, and in the meantime until such adoption, the Corporation may from time to time contract with the said local boards, or either of them, for the maintenance of such road or any part thereof as a highway, not repairable by the inhabitants," and so on.

The road was constructed, but it has never been taken over by the Audenshaw and Denton Local Boards or their successors, the defendant Councils. It remains a road which was made and is to be maintained by the Corporation. The powers under sub-s. iv. of s. 14 have not been put in force and the duty of the Manchester Corporation remains.

It is important to remember that inasmuch as the road which it replaced, Taylor Lane, was one of which the cost of the repairs could be extracted from the frontagers, in respect of this new road there was to be the same right on the part of the local authorities to extract from the frontagers the cost of the maintenance of the road if and when the Urban District authorities took over the road and had the right and duty of maintaining it.

These two defendant Councils are representative bodies who have to remember that they must not impose upon the ratepayers at large an expense which ought to be borne by

a particular body of ratepayers—namely, the frontagers of the new road, if that liability has been properly put upon the frontagers. I am pointing this out and dwelling upon it, because I want at the outset to make it quite plain that as the matter stands upon the facts before us the Corporation having made the road are the persons who are to maintain it, and that there having been no adoption by the defendant Councils, those authorities have no duty, right, or power in respect of the road.

Before the action was brought there was a controversy between the parties as to what were the respective duties of these three authorities, the Corporation and the two defendant Councils, in respect of this road, and correspondence passed, in which undoubtedly the defendants, the two defendant Councils, contended that the full liability in respect of the maintenance of the road fell upon the Corporation. The Corporation took the point that what had happened to the road was in the main due to the increased traffic which had fallen upon it. The defendant Councils, in spite of that, said that whatever repairs were necessary to the road ought to be undertaken and paid for by the Corporation. On the other hand, the Corporation contended that their liability was only a liability of such nature as existed at the time when the road was made, namely in 1878, and no greater, and that inasmuch as the road had been brought to its present condition by traffic which was not contemplated in the year 1878, the defendant Councils could not impose upon them the liability for the present condition of the road, due to and caused by the unforeseen heavy mechanical traffic.

I ought to add that when the new road was built, at first it passed through an area in which there were no frontagers to the road, but since that time there has been erected a foundry which fronts to the road. That foundry, as I understand, has either belonging to or connected with it two other foundries which now abut upon the road, and quite recently there has been a housing scheme adopted by the defendant Councils, which has brought a number of houses in proximity to the road. But, broadly speaking, except for the foundries,

C. A. 1928

MANCHESTER CORPORATION v. AUDENSHAW URBAN COUNCIL AND DENTON URBAN COUNCIL.

Lord Hanworth M.R.

there is a large front of the area abutting on the road which is not occupied by houses.

As has been pointed out by Lawrence L.J. in the course of the argument, if these two defendant Councils endeavoured to take over the road it would first have to be made up, and there might be difficulties, because any objection by the frontagers would have to be dealt with by the justices, and according to the practice of which we are informed, their approval would not be obtainable unless and until there were an adequate number of frontagers, so as not to put an absurd burden upon a single frontager who might be responsible for the repair of the whole road ratione tenurae; but whatever be the difficulties and whatever be the rights of the defendant Councils, as the road stands with these foundries abutting upon it, they have not taken over and adopted the road.

It is said that what has broken the road down is the heavy traffic which has passed along it in transit to the foundries. That may be so, but it must be remembered that there are a number of sections in more than one Act which enable road authorities to take steps to secure that a contribution shall be made in respect of extraordinary traffic which passes along a road. However, the situation is this, that there is the road, and Sir Herbert Cunliffe was quite unable to suggest any date at which it could be said that the Corporation had ceased to be under the liability which is imposed upon them directly by s. 14, sub-s. ii., which says that the road shall at all times hereafter be maintained by and at the expense of the Corporation.

The controversy had gone on for some time. I am not, however, concerned with that controversy, because I am going to assume, as I said yesterday, that on both sides their views were urgently pressed, as they ought to be, because the Corporation and the defendant Councils being representative bodies, it would be their duty to try to relieve themselves from a heavy and burdensome liability. However, as they failed to come to an agreement, the action was brought and the writ was issued on November 30, 1926. The plaintiffs, the Corporation, contended that their

liability in respect of the road was limited by virtue of sub-s. ii. of s. 14 of the Act, and that they were only liable to maintain the road in the condition it was in when it was made and completed in or about the month of April, 1878. Further or in the alternative the Corporation contended that they were only liable to maintain the road in a state of repair sufficient for the traffic at the date when the Act was passed or in the further alternative at the date when the road was completed. That is what they claimed, and by an amendment made at the trial, which we have to consider, because it was an amendment which was introduced before the judgment was delivered, they claimed a declaration (1.) " that under and by virtue of s. 14, sub-s. ii., of the said Act of Parliament they are only liable to maintain the said Corporation road in the condition in which it was completed in or about April, 1878, and are not under any obligation to maintain the carriageway of the said road in a fit state to bear the ordinary traffic of the present day "; and by (2.) they asked for " An inquiry what sum, if any, is proper to be contributed by the plaintiffs for the maintenance of the road having regard to the aforesaid declaration."

The defendant Councils, on the other hand, claimed that there was a liability on the Corporation which was not limited by the conditions which prevailed in 1878, the date when the road was completed under the Act of 1875, but was an unlimited liability upon the Corporation to maintain the road whatever should be the traffic upon it, and by way of counterclaim they asked that there should be a declaration made " that the plaintiffs are under an obligation to maintain the carriageway of the road in a fit state to bear the ordinary traffic thereon at the present day," or in the alternative " (*a*) A declaration that the plaintiffs are under an obligation at all times to maintain a macadamized carriageway, the foundation thereof to be rubble six inches in depth, covered with hard macadam with a depth of at least 12 inches "; and " (*b*) a declaration that the last mentioned obligation exists whatsoever may be the nature of the ordinary traffic on the road at the present day "; and " 3. A declaration

C. A. 1928

MANCHESTER CORPORATION v. AUDENSHAW URBAN COUNCIL AND DENTON URBAN COUNCIL.

Lord Hanworth M.R.

that the carriageway of the road is not now being maintained in accordance with either of the obligations sought to be established as aforesaid."

I desire to point out at once, for I think that is how this case has got into a somewhat unfortunate position, that the second claim made by the plaintiff Corporation as amended is one which is based upon a situation which has never arisen. It asks for an inquiry of what sum, if any, is proper to be contributed by the plaintiffs for the maintenance of the road having regard to the aforesaid declaration, but the defendant Councils have not adopted the road, and it is not their duty, having regard to the terms of the statute, to repair it. The repairs of the road must be carried out by the Corporation, and there is no duty and, so far as I can find, no right on the part of the defendants to repair the road and to ask for a contribution from the Corporation. There is under the statute of 1875 no duty on the part of the Corporation to contribute to somebody else's liability. The duty is such as I have described and is stated in the sections. To ask, therefore, for this inquiry under the second part of the prayer is to ask for something which is based on a misconception of the rights or duties of the parties inter se.

Now, Eve J. says in his judgment (1): "The conclusions to be drawn from the evidence adduced at the trial can, I think, be summarized thus: (1.) By a macadamized road in 1875, and for a quarter of a century afterwards, was meant a road of water-bound macadam. Tar spraying and the use of tar macadam did not exist prior to the commencement of the present century. (2.) Such a road was adequate for the traffic over this road in 1878 and the next forty years. (3.) During such last mentioned period, the road was maintained by the plaintiffs in accordance with their statutory obligations. (4.) The road at the commencement of this action was, and it still remains, in a condition of serious disrepair. This condition is in the main due to traffic of a character unknown in 1878 and for many years afterwards. (5.) The road is not incapable of being repaired as a waterbound macadamized road, but

(1) Ante, p. 134.

unless such repair is supplemented by the introduction of some binding material and by tar spraying or some other expedient unknown before 1900, the already existing traffic over it will inevitably bring about rapid destruction. (6.) The result is that from the economic standpoint the road constructed in accordance with the statutory requirements of 1875 cannot be maintained in a condition adequate for present day traffic without expenditure of a nature unknown and on work never contemplated until the road had been completed and in use for a quarter of a century and more. (7.) The traffic over the road when repaired is more likely to increase than to remain stationary."

It is important to observe in those findings that it is possible to repair the road, and it is possible to repair it as a water-bound macadamized road such as was constructed and was maintained from and after 1878. It also appears that in the main, though not in totality, traffic of a character which was not known in 1878 has led to the condition of serious disrepair in which the road is found. I give full weight to those observations. In finding (6.) Eve J. says that from the economic standpoint the road cannot be maintained without expenditure of a nature unknown and on work never contemplated until the road had been completed and in use for a quarter of a century. It appears to me that those findings, especially that finding from the economic standpoint—and I think Mr. Bennett suggested from the practical standpoint—have led to a misunderstanding in this case. We have not to approach it from the point of view of what should be done in an area if we, as arbitrators, had to determine what would be the wise thing to do in relation to this road, sweeping away all the duties, all the powers, and all the restrictions imposed by Acts of Parliament on the three bodies that are before us. We are not asked to give, and we have no power to give, judgment from the economic standpoint or from the practical point of view. We have to determine in relation to these bodies, which are all three of them bound by certain statutes, what are the liabilities inter se, and therefore the economic point of view,

C. A. 1928

MANCHESTER CORPORATION v. AUDENSHAW URBAN COUNCIL AND DENTON URBAN COUNCIL.

Lord Hanworth M.R.

although it may be very wise that the parties should come to some agreement from that point of view, is not one which we have to consider or on which we can rest our judgment.

Those are the findings, but it is to be observed that they do not form any basis upon which it could be said that the Corporation have ceased to be liable in respect of the maintenance of this road under s. 14, sub-s. ii. It is possible for them to repair this road. "The road is not incapable of being repaired," says Eve J., "as a waterbound macadamized road." (1) That being so, I can find no reason for saying that that liability which primarily rests upon the Corporation does not continue at the present time, and I cannot see how their liability could be interpreted in the mere terms of a contribution to be made to some authority who have not the control at the present time. Eve J., at the close of his judgment, said (2): "I am satisfied that some reconstruction work to surface and foundations alike would be called for. But on the other hand the fact that the road has been, and is still being, so used and that present day conditions are such as to render an obligation to maintain it as in 1878 of no practical use, does not, in my opinion, operate to free the plaintiffs from all liability to contribute to the cost of repair, and if in fact it can be established that any default on the part of the plaintiffs in the years during which they have suspended work on the road has increased the expenditure which will now have to be incurred in restoring the road the plaintiffs are, in my opinion, liable to contribute to the extent of such increase. I propose to make a declaration in the terms of para. 1 of the prayer and to dismiss the counterclaim. I will give leave to the defendants to apply for an inquiry as to any contribution which they may allege ought to be made by the plaintiffs to the cost of reconditioning the road and generally."

He carried out, therefore, to its conclusion the view which he held, based on the economic point of view and the practical point of view, and determined that he would grant a declaration of the liability of the plaintiffs, but side by side with that

(1) Ante, p. 134. (2) Ante, p. 136.

declaration of liability, which is of no practical use, he by the inquiry which he ordered showed that the only liability which he intended to impose upon the plaintiffs was such a liability as might be found after inquiry to call for a sum by way of contribution to the maintenance of this road.

Perhaps I ought to have called attention to the sums which have been expended by the plaintiff Corporation in the maintenance of this road. I will not trouble about the earlier years or the years immediately after the war, but in 1919 they spent a sum of 1*l.* 12*s.* 10*d.* and no more, and after that time from 1920 to 1925 they spent a sum which, I think, averages about 60*l.* to 70*l.* and no more. The photographs which are before us show that Eve J.'s statement as to the condition of the road is, as one would expect it to be, well founded.

Now, having regard to those findings, can it be said that this judgment which has been drawn up on these pleadings is right? The judgment is that the Court doth declare that by virtue of s. 14, sub-s. ii., the Corporation are only liable to maintain the road in the condition in which it was completed in or about the year 1878, and then it is adjudged that the defendants' counterclaim, which contained alternative suggestions as to what the liability of the plaintiffs might be, is dismissed—I have already read them—and the defendants are to be at liberty to apply for an inquiry as to any contribution which they may allege ought to be made by the plaintiffs to the cost of the reconditioning of the said Corporation Road, and generally as they may be advised. That is an inquiry which indicates that the Corporation are the owners of the road, and yet somehow or another the defendants are to repair the road, to remake the road, and the Corporation are only to make a contribution to the expenditure necessary for that purpose to the extent to which it can be held or found that the suspension of the work by the Corporation during the past few years has led to an increased expenditure at the present time. It appears to me that that judgment and the inquiry are based upon a confusion of thought which fails to allow for the

C. A. 1928

MANCHESTER CORPORATION v. AUDENSHAW URBAN COUNCIL AND DENTON URBAN COUNCIL.

Lord Hanworth M.R.

continuance of the liability of the Corporation in respect of what Eve J. calls "this Corporation Road," which they are to maintain and are to maintain under the statute at all times; for those times have not been brought to an end, as they might have been brought to an end, under s. 14, sub-s. iv.

I come, therefore, to consider the authorities which have been cited to us. The *Sharpness* case (1), of course, is of the greatest importance. That was a case in which the House of Lords determined that there was not a liability upon the undertakers to maintain their bridges so as to be suitable for the future traffic which had arisen subsequently to the time when the bridges had been constructed to the satisfaction of the Commissioners, whose satisfaction had to be expressed, I think it was, under s. 12. The claim there put forward by the Attorney-General (2) was for "a declaration that the appellants were liable to support, maintain, and keep in repair certain bridges in the claim specified, which carried common highways over the appellants' canal within the city of Worcester, sufficient to bear the ordinary traffic of the district and the traffic which might reasonably be expected to pass along the said highways having regard to the present character and needs of the district." That is what was sought to be enforced. The smaller question of whether or not they were bound to keep the bridges in the condition in which they had been approved by the Commissioners was not a point which was raised. I think, sub silentio, it is assumed in nearly all the speeches that that liability, of course, remained. I say that because Lord Haldane says (3): "The Court of Appeal seem to have thought that the obligation under these words to maintain and repair might have imposed an obligation to make new works, by analogy to the general obligation of the county authority to keep a highway in such a condition that it could carry not only the traffic of the period at which it was made, but heavier traffic coming into existence subsequently." That is the common law liability of the highway authority

(1) [1915] A. C. 654. (2) [1915] A. C. 656.
(3) [1915] A. C. 654, 662.

who are bound to maintain the highways, but then he passes on: "But s. 61 of the Act which we have to construe in the present case does not appear to me to admit of resort to any presumption of intention based on the analogy of the common law." So that what ultimately was determined in the *Sharpness* case (1) was, What was the duty imposed by the statute which by imposing a statutory duty excluded the presumption of the common law? Lord Dunedin says (2): "I am not doubting the authority of these two cases. But it seems to me a perfectly different thing to come to the conclusion that when, without special statutory authority, there has been made an obstruction to a public road, which obstruction has been obviated by means of a bridge, then the right of the undertaker to continue the obstruction is conditional upon his maintaining the bridge"—and then comes the antithesis—"and to raise up a so-called common law doctrine of repair where the work in question is specifically allowed by statute; and when the statute itself in a clause or clauses expresses the conditions under which the work may be done."

The decision as a whole is that by virtue of the terms of the statute there was a liability to repair and repair only in accordance with and up to the standard accepted by the Commissioners when the bridges had been built, with the result that the House negatived the claim for a declaration that the appellants were bound to maintain and keep in repair the bridges, so that they might be able to bear the traffic expected to pass along the highways, having regard to the present character and needs of the district.

The next case of the *Lagan Navigation Co.* (3) is just as plain. There were certain facts which were admitted at the trial before Wilson J. One of them was (4): "The said bridge, and also the retaining and other walls connected therewith, have been since their construction maintained in a good and sufficient state of repair adequate to carry the traffic of the said district as existing at the date of the passing

(1) [1915] A. C. 654.
(2) Ibid. 664.
(3) [1924] A. C. 877.
(4) Ibid. 880.

C. A. 1928

MANCHESTER CORPORATION v. AUDENSHAW URBAN COUNCIL AND DENTON URBAN COUNCIL.

Lord Hanworth M.R.

of the said Act " in 1843 ; and then the question was : (*a*) Are the respondents bound to keep the bridge fit for present day ordinary traffic, or (*b*) are they only bound to keep the bridge in an efficient state for such ordinary traffic at the date of the passing of the Act in 1843 ?

Again, the decision is that by virtue of the terms of the statute, the liability was only one to maintain the bridge in the condition which was imposed upon them by the statute. The passage which has been referred to in the speech of Lord Atkinson says that the statute, virtually if not expressly, excluded any other liability than that which was laid down by the statute.

The last case to which Mr. Bennett refers, *Attorney-General* v. *Great Northern Ry. Co.* (1), is to the same effect. There the decision was that the railway company were not liable to improve and strengthen the bridge to make it sufficient to bear the ordinary traffic of the district which may be reasonably expected to pass over it, according to the standard of the present day.

Applying those cases to the present one, there is a liability recognized by Eve J. and possible of fulfilment by those persons, who alone have a duty in respect of the road—the Corporation. They have a duty to maintain the road at a standard which was fit for the traffic in 1878. There is no finding that they have done so. There is no finding that at the present time after the expenditure of this 60*l.* or 70*l.* in the last eight years there has been a maintenance of that standard. All that has been said, and indeed claimed, is that by reason of this increase of traffic they ought not to be bound, or that it would be unwise, economically or practically, to hold them liable to a duty which still remains upon them by statute. We are told that the evidence by some of the witnesses was that if the road is repaired to such a standard as would have been suitable for the traffic in 1878, the road would last, some of the witnesses say, five years, and others say ten years. But if it is to last, and does last, for five years, it may be that the Corporation will, at

(1) [1916] 2 A. C. 356.

the end of that time, have to repair it again, and it may be that it would be wiser on their part to undertake repairs which will last longer. They have the opportunity of doing so, if they are so minded to do it. They cannot be prevented, because *Sandgate Urban Council* v. *Kent County Council* (1), to which we were referred, shows that where there is a responsibility on the part of an authority to maintain a footpath, they have the power to undertake works which are not immediately connected with the footpath itself but are for the purpose of the maintenance of the footpath, and that if they do undertake that liability, they are entitled to make a charge upon their ratepayers. Lord Halsbury says (2): "I have no hesitation in saying that, assuming a thing to be necessary for the preservation of the road, and assuming that the local authority is under obligation to keep up the road, the law of England is that you shall keep up that road by whatever means are appropriate and necessary to do it."

The point that we have to determine is, have they ceased to be liable under s. 14, sub-s. ii., of the Act, and for the reasons which I have given, it appears to me that that liability has not terminated. That is their primary duty in respect of it, and they have to make up the road to the standard suitable in 1878. Whether it lasts a longer or a shorter time, or whether that is the best and most economical way of dealing with this matter, if the whole subject were on a clean slate, I do not know. Whether that is the most practical way of dealing with it, I do not know; but that is the legal responsibility which is imposed upon them by the statute.

Now, inasmuch as Eve J.'s order does not meet that point and does not declare that liability, it appears to me that his order must be varied so as to embody that liability, and with regard to the costs, inasmuch as the defendant Councils claimed a great deal too much below, we think that it would be wise not to interfere with the costs. I think Eve J. dealt with them at the trial, but the appellants will be entitled to the costs of this appeal.

(1) 79 L. T. 425. (2) 79 L. T. 427.

C. A. 1928 — MANCHESTER CORPORATION v. AUDENSHAW URBAN COUNCIL AND DENTON URBAN COUNCIL.

LAWRENCE L.J. I agree. I think it is plain that there has been some misunderstanding in this case, both on the part of the Manchester Corporation and on the part of the learned judge, and that it is this misunderstanding which has necessitated the present appeal.

The Manchester Corporation were, by their special Act of 1875, authorized to make and construct the road in question. Sect. 14 of that Act lays down the particular manner in which the road should be constructed—namely, that it was to be made of a certain width, with stone boundary walls and footways on each side; that the carriageway was to be macadamized and that the foundation was to be of rubble six inches in depth and covered with hard macadam to a depth of at least 12 inches. The section also provided that the Corporation should at all times thereafter maintain the road at and by their own expense. By sub-s. iv. of the same section it is enacted that the road shall not be deemed to be completed until it has been made and sewered in accordance with the above provisions, and to the reasonable satisfaction of the Audenshaw and Denton Local Boards.

The road was completed to the satisfaction of those Boards in the year 1878, and was for a considerable period thereafter maintained by and at the expense of the Corporation. In or about the year 1922, however, the road had fallen into a state of disrepair and the defendants called upon the Corporation to put it into proper repair, at the same time claiming that the Corporation were liable, under the Act, not merely to maintain the road in the condition in which it was when it was completed in 1878, but to recondition it in such a manner as to make it a more solid and substantial road, better fitted to bear the modern heavy traffic which is now passing over it. The Corporation did not dispute their liability to maintain the road in the condition in which it was when completed in 1878, but strenuously denied that they were under any obligation to make a better, or more substantial, road such as the defendants demanded. The defendants, however, insisted on their claim, and thereupon the Corporation commenced this action with a view to having

it decided whether such claim was well, or ill, founded. By their statement of claim as originally delivered the Corporation claimed two declarations, first a declaration that under and by virtue of the section to which I have referred, the Corporation were only liable to maintain the road in the condition in which it was completed in 1878, and secondly a declaration, that the only obligation imposed upon them by that section was to maintain the road in a state of repair sufficient for the ordinary traffic at the date of the passing of the Act, or at the date when the road was made. The defendants, on the other hand, by their defence insisted upon their claim to saddle the Corporation with the liability of making a better and more substantial road, and they counterclaimed for a declaration to give effect to such claim. Therefore, the issue at the trial was, whether the liability of the Corporation was such as the defendants claimed it to be, or whether the Corporation were only under the lesser liability which they had never disputed.

At the trial counsel for the Corporation and the learned judge seem to have assumed that if the issue thus raised were decided in favour of the Corporation then the defendants would undertake the heavier burden of constructing the road in a more substantial fashion, and that the question would resolve itself into a question of how much money the Corporation should contribute towards the expense of so constructing the road. It was apparently also assumed by the Corporation and by the learned judge that the amount of such contribution would be measured by the expense which the Corporation would have had to incur if they had fulfilled their statutory obligation, applying, by analogy, the case of *Scott* v. *Brown*. (1) Those assumptions which, in my opinion, were erroneous, led to the amendment of the prayer of the statement of claim, and to the insertion of the inquiry in the judgment pronounced at the trial.

Undoubtedly the defendants were anxious that the Corporation should construct a better and stronger road, and in the

(1) (1904) 68 J. P. 181.

C. A. 1928

MANCHESTER CORPORATION v. AUDENSHAW URBAN COUNCIL AND DENTON URBAN COUNCIL.

Lawrence L.J.

Court below they endeavoured to enforce their view that the Corporation were liable to construct such a road. The learned judge held this view to be wrong, and dismissed the counterclaim with costs. I cannot, however, find any justification for the assumption that, having failed to establish their contention, the defendants would themselves recondition the road and would convert the liability of the Corporation under the Act into a monetary contribution towards such reconditioning. Nor do I find any trace, either in the pleadings or elsewhere in the case, of any statement by the defendants that if they failed in their contention they were not going to insist on the fulfilment by the Corporation of their statutory duty to maintain the road in the condition in which it was completed in 1878.

Mr. Scholefield has pointed out certain obstacles in the way of the defendants undertaking the reconditioning or repair of the road. No doubt the defendants have power, under s. 148 of the Public Health Act, 1875, to come to an agreement with the Corporation to take over the repair and the maintenance of the road, but the adoption of such a course might involve them in certain difficulties which it is not necessary to specify here. Further, there can be no doubt that, under the Private Street Works Act, 1892, the defendants might take the prescribed steps with the view of their making up the road at the expense of the frontagers; in that case, however, the frontagers could make objections, and such objections would have to be determined by the justices. Mr. Scholefield told us—and I have no doubt that he was right—that in the state in which the road now is as regards the buildings fronting it, the objections would in all probability be sustained. But, be that as it may, it is quite sufficient that the defendants have no intention, and never had any intention, of undertaking the reconditioning or the repair of the road at the present time and that they intend, so far as they lawfully can, to insist upon the Corporation fulfilling their statutory obligations, notwithstanding that such obligations were not so great as the defendants had hoped.

The learned judge founded his judgment upon the *Sharpness* case. (1) The defendants, although by their notice of appeal they have attacked that part of the judgment, have not presented any argument to this Court to show that the learned judge was wrong in the view he took. Eve J. referred especially to the passage in the *Sharpness* case (2), in which Lord Parker stated that the standard by which the obligation has to be judged is neither the ordinary traffic when the canal was constructed, nor the ordinary traffic of to-day, but the bridge itself as determined by the Commissioners under the Act. The learned judge applied that statement to the facts of the present case, and held that the standard by which the obligation on the Corporation is to be judged is neither the ordinary traffic when the road was constructed nor the ordinary traffic of to-day, but the road itself as completed in accordance with the provisions of the Act to the satisfaction of the local boards. Now, so far as I can judge without hearing any arguments to the contrary, the learned judge was perfectly right in coming to that conclusion. But then the learned judge went on to say that no Court would enforce such an obligation, giving as his reason, that if the obligation were enforced, it would lead to an extravagant and wasteful expenditure. It was proved at the trial that the road was not incapable of being repaired as a waterbound macadamized road in the condition in which it existed in 1878. There was a conflict of evidence as to how long such a road would last without having again to be repaired. I have not read the evidence, but from what counsel have told us there seems to be a question whether it would last some four or five years at the lowest estimate, or some nine or ten years at the highest; this evidence shows that the expense of complying with the statutory obligation may, by reason of the nature of the traffic passing over it, be heavier at the present time than it was when the road was originally constructed. That increased expenditure, however, does not relieve the Corporation from their statutory obligation, as declared by the learned judge. If the Corporation desire to minimize the expense

(1) [1915] A. C. 654. (2) [1915] A. C. 669.

C. A. 1928

MANCHESTER CORPORATION v. AUDENSHAW URBAN COUNCIL AND DENTON URBAN COUNCIL.

Lawrence L.J.

of complying with their obligation, the cases cited by Mr. Scholefield (such as the *Sevenoaks'* case (1) and the *Sandgate* case (2)) show that they have ample power to make a road which would last longer than they allege would be the case if they only effected the repairs which in strictness they are bound to effect; but that is a matter for them to determine for themselves. In my opinion the learned judge was wrong in stating that the liability of the Corporation which he held to exist was one which would not be enforced. I do not see how that liability can, without the assent of the defendants, be commuted into a money contribution towards the expense of their reconditioning the road. If such an agreement were come to it might well commend itself to the Court and to the Corporation as a practical method of solving the questions which have arisen between the parties, but the Court cannot assume that such an agreement must inevitably be entered into and direct an inquiry on that footing. In my judgment such an inquiry would prejudice the defendants in the event of their seeking to enforce the liability which the Court has declared the Corporation to be under. From the wording of the inquiry it would appear as if the defendants had alleged and were alleging that the Corporation ought to contribute a sum of money towards the expense of the defendants reconditioning the road, and I think that if they had attempted to enforce the declaration whilst the order contained the inquiry, that it might reasonably be said that the Court never intended that the declaration should be enforced.

For these reasons I agree that the judgment of the learned judge should be varied in the manner stated by the Master of the Rolls, and that the Corporation should pay the costs of this appeal.

RUSSELL L.J. I am of the same opinion, but inasmuch as we are varying to some extent the order which the learned judge below made, I desire to add a few observations.

The important thing to ascertain at the outset of this appeal is, what exactly was the dispute between the parties

(1) 11 Ch. D. 625. (2) 79 L. T. 425.

which the Court was asked to decide in the action. In order to show what the dispute was in a concrete form reference should be made to the *Sharpness* case (1) and the three decisions which were given in that case. The decision of Phillimore J. was a declaration of liability measured by the traffic existing at the date when the structure was brought into being. The Court of Appeal reversed that and declared that the measure of the liability was the traffic at the present day. The House of Lords reversed that in substance, restoring the view taken by Phillimore J., but varying his order by declaring that the measure of liability was not traffic of the present day, nor the traffic of the past date, but the bridge as erected at the past date.

Now bearing those points in mind and turning to the pleadings in the case one can see exactly what it was that the parties were respectively contending to be the measure of the plaintiffs' liability. The plaintiffs contended for and sought to obtain a declaration that under and by virtue of s. 14 of the private Act they were only liable to maintain the Corporation Road in the condition in which it was completed in or about April, 1878; that is to say, they were contending for a declaration in accordance with the decision of the House of Lords in the *Sharpness* case. (2) Alternatively they claimed a declaration that the only obligation imposed upon them by s. 14 of the Act was to maintain the road in a state of repair sufficient for the ordinary traffic at the date of the passing of the Act. Alternatively, therefore, they were contending for a declaration in the terms of Phillimore J.'s decision.

The defendants, on the other hand, in their defence and counterclaim contended that the plaintiffs are under an obligation to maintain the carriage-way of the road in a fit state to bear the ordinary traffic thereon at the present day. In other words, they were seeking a decision that the measure of liability was to be such as the Court of Appeal had held to be the proper measure in the *Sharpness* case. (3)

(1) [1913] 1 K. B. 422; [1914] 3 K. B. 1; [1915] A. C. 654.
(2) [1915] A. C. 654.
(3) [1914] 3 K. B. 1.

C. A. 1928

MANCHESTER CORPORATION v. AUDENSHAW URBAN COUNCIL AND DENTON URBAN COUNCIL.

Russell L.J.

At the trial Eve J. decided that contention in favour of the plaintiffs, and correctly so in virtue of the decision of the House of Lords in the *Sharpness* case (1); and he held that the liability was a liability defined by the Act of 1875, and limited by that definition. That is to say, the liability was a liability to maintain the Corporation Road as a road of the class and durability described in s. 14 of the private Act, as it was there described and as it was in fact constructed and approved by the local boards in 1878. The passage in which you find the kernel of the learned judge's decision is where he applies the remarks of Lord Parker in the *Sharpness* case (2) to the facts of the case before him; he says (3): "Applying what Lord Parker says in his speech in the *Sharpness* case (2) to the facts of this case, I should say that what the plaintiffs have to maintain is the fabric of the particular road of which the size, character and formation were determined by the Act and that there is no principle of construction by which an obligation to maintain a particular structure can be enlarged into an obligation to reconstruct the fabric in such a way that it is materially different in size, character or formation from the particular fabric the subject of the obligation"; and he made a declaration to that effect which is contained in his order. So far, in my opinion, the decision of the learned judge was correct in every respect and could in no way be complained of; but unfortunately he did more than that. He made remarks in the course of his judgment, of which we have the shorthand note before us, and he added a provision to the order, and the remarks which he made in the course of his judgment were to the effect that the obligation which he so declared to be liability of the plaintiffs, was a liability or obligation which no Court would enforce. In that respect I think the learned judge was wrong, and he added to the order this provision: "And it is further adjudged that the defendants be at liberty to apply for an inquiry as to any contribution which they may allege ought to be

(1) [1915] A. C. 654. (2) [1915] A. C. 654, 669.
(3) Ante, p. 136.

made by the plaintiffs to the cost of reconditioning the said Corporation Road." Now it appears to me that so long as that provision remains in the order there exists, putting it at its lowest, a two-fold suggestion, first of all, that the plaintiffs are not under obligation to do the work, but that the obligation of reconditioning the road rests with the defendants; and secondly, the suggestion that the liability and obligation of the plaintiffs is not to do the work but to make a contribution to the expenses incurred by the defendants in doing the work; in both respects the suggestion is, in my opinion, wrong, and it was essential from the point of view of the defendants that they should come to this Court to get that matter put right. In other words, what the learned judge has done is this. Having decided in favour of the plaintiffs—in my opinion quite correctly—the point which the Court was asked by the parties to decide in the action, he has diverged into a statement of what he thinks the position ought to be upon the footing that the defendants are the persons upon whom the obligation rests to do the work of reconditioning the road. From such an order the defendants were bound to appeal, and they did appeal; but when I look at their notice of appeal, the appeal put forward by them in that document is not in any way limited to seeking to have that provision of the order struck out and the rest of the order to remain. As I read their notice of appeal it goes this far: it seeks to reverse the decision of the learned judge and to decide in favour of the defendants upon the counterclaim and give them a declaration in the terms of the view of the Court of Appeal in the *Sharpness* case. (1) That would be wrong. However, that was not the attitude adopted by the appellants by their counsel, Mr. Scholefield, before this Court; all they asked for was, the deletion from the order of the provision in regard to an inquiry. When that was stated by their counsel it was interesting then to observe the attitude assumed before us by counsel on behalf of the Corporation. The attitude then assumed was: We, the Corporation, would have no objection to that offending

(1) [1914] 3 K. B. 1.

C. A. 1928

MANCHESTER CORPORATION v. AUDENSHAW URBAN COUNCIL AND DENTON URBAN COUNCIL.

Russell L.J.

provision coming out, but if that is so then we will contend that our obligation has come to an end in toto. Now I confess I am unable to appreciate how any such contention can be put forward. How or when the obligation came to an end was not in any way suggested; but the objection to any such attitude being successfully assumed on the part of the Corporation before us is this: they obtained a declaration in their favour from the learned judge in the Court below upon the footing of their being legally liable. They obtained that decision in their favour in accordance with their pleading, and there is no appeal by them from that decision of the learned judge. In those circumstances it would be impossible for this Court to declare that there was no liability on the Corporation, or that the Corporation's liability under the statute had come to an end.

The learned judge's decision in the Court below was correct in every respect except as regards the insertion of the provision as to an inquiry for contribution by the plaintiff Corporation. That provision should be struck out of the order, and the result will be to vary the order of the learned judge in the Court below by omitting from it all the words beginning with the words "And it is further adjudged" down to and including the words "as they may be advised," leaving the rest of the order standing as to costs and otherwise.

Order varied.

Solicitors for appellants: *Stibbard, Gibson & Co., for Rupert Wood, Ashton-under-Lyne; and for William Richards, Denton.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for P. M. Heath, Town Hall, Manchester.*

W. I. C.

HOOD'S TRUSTEES *v.* SOUTHERN UNION GENERAL INSURANCE COMPANY OF AUSTRALASIA, LIMITED.

C. A. 1928 TOMLIN J. *Feb.* 1, 2. C. A. *June* 14, 15.

[1926. H. 3189.]

Bankruptcy—Insurance Company—Third Party Risks—Accident within Terms of Policy—Claim by injured Party against Assured—Subsequent Bankruptcy of Assured—Judgment on injured Party's Claim after Assured's Bankruptcy—Claim by Trustee against Insurance Company—Chose in Action—Right vesting in Trustee in Bankruptcy—Rights of injured Party under Judgment—Purported Release by Bankrupt of Claims against Insurance Company—Estoppel.

H., who had taken out a policy of insurance in the defendant company against third party risks, was involved in an accident whereby one C. was seriously injured by H.'s motor car. C. subsequently commenced proceedings against H. for damages, but before obtaining judgment H. was adjudicated a bankrupt and the official receiver was appointed the trustee in the bankruptcy. The trustee informed the defendant company in reply to a question put by them that he did not propose to take any part in C.'s action against H. H. subsequently purported for an agreed sum to release the defendant company from their liability under the policy to indemnify him in respect of any judgment obtained against him by C. Shortly afterwards C. obtained judgment against H. for damages for the injuries sustained by him.

Subsequently H. committed a second act of bankruptcy and was adjudicated a bankrupt for the second time, and a trustee was appointed.

In an action brought by the two trustees jointly for a declaration (inter alia) that the defendant company were liable to indemnify H. and/or the plaintiffs against the damages awarded to C. and that the agreement by which H. purported to release the defendant company, was null and void:—

Held, by Tomlin J. and the Court of Appeal, that the benefit of the indemnity vested in the trustee under the first bankruptcy notwithstanding that C.'s claim, being one in respect of a tort for which judgment was not obtained till after the commencement of the first bankruptcy, was not provable in such bankruptcy.

In re Richardson [1911] 2 K. B. 705 discussed and distinguished.

Principles laid down in *In re Harrington Motor Co.* (1927) 44 Times L. R. 58; since reported ante, p. 105, discussed and applied.

Held, also, that the benefit of the indemnity having vested in the trustee in the first bankruptcy, his right thereto could not be affected by any subsequent agreement between the defendant company and H.

Held, further, that the trustee in the first bankruptcy was not estopped by his refusal to take part in C.'s action against H. from asserting his claim against the defendant company.

ACTION.

By a policy of insurance dated June 27, 1924, and numbered 265,113, the defendant company undertook in consideration

C. A. 1928 — HOOD'S TRUSTEES v. SOUTHERN UNION GENERAL INSURANCE CO. OF AUSTRAL-ASIA.

of an annual premium of 18*l.* 7*s.* 11*d.* to indemnify one, Alfred Hood (inter alia), against "any liability for compensation (including all costs and expenses incurred with the consent of the company) for accidental bodily injury to or death of any person and/or for damage to property caused by, through or in connection with any car specified in the . . . . schedule thereto or any private motor car driven by the insured but not belonging to him." And it was also provided that if the assured had any other private car or cars not specified in the schedule to the policy insured with the defendant company under any other policy or policies, then the benefit of the insurance should be recoverable under one policy only; and there was a further provision: "That this policy shall be subject to the conditions herein expressed or indorsed on the back hereof which are to be taken as part of this policy, and shall be conditions precedent to any liability under this policy."

By condition 1 it was provided as follows: "In the event of any accident causing injury or damage covered by this policy or of any police proceedings against the insured or any driver of the said motor cars, notice thereof shall be given to the company immediately it comes to the knowledge of the insured, or of the insured's representative for the time being. Such notice shall give full particulars of the accident, loss or damage, and, where practicable, the names and addresses of the owner and/or driver of any vehicle or other object involved in the accident, and the names and addresses of the witnesses of the accident. The insured shall also give immediate information to the company of every claim made upon him, and shall give all necessary information or assistance to enable the company to deal with, settle or resist, any claims as the company may think fit."

On December 27, 1924, during the currency of the policy, Hood, while driving the motor car specified in the schedule, was involved in an accident, whereby one, William John Caddy, was seriously injured. Hood gave notice of the accident to the defendant company about a month afterwards, together with particulars of the time and place of the

accident and the probable cause; the defendant company however required further information, which was supplied by Hood.

In or about March, 1925, the injured man, Caddy, threatened proceedings against Hood for damages for personal injuries, but through his solicitors agreed to postpone the issue of the writ until the solicitors for the defendant company, who had taken charge of the matter, had considered Hood's liability.

An offer by the defendant company to Caddy having been refused, the writ was issued against Hood on June 10, 1925, for damages for the injuries caused to Caddy, and on July 21 the statement of claim was delivered.

On September 4, 1925, Hood (hereinafter called "the bankrupt") committed an act of bankruptcy, upon which there was a petition dated September 10, followed by a receiving order on September 30, and ultimately by an adjudication on October 9, 1925.

On such adjudication the official receiver was appointed trustee of the bankrupt's property, and was the first plaintiff in the action against the defendant company in respect of the indemnity arising under the policy of insurance.

The defendant company became aware of the bankruptcy on or about October 12—three days after the adjudication—and on October 22, 1925, the following letter, addressed to the official receiver in the bankruptcy, was sent by the defendant company's solicitors: "We understand a receiving order has been made against the above in the Chelmsford Court. We have been acting for the bankrupt through his insurance company, in certain proceedings commenced in the High Court against him by William John Caddy, claiming damages for personal injuries sustained, owing to his being knocked down by a motor car driven by the bankrupt on December 27, 1924, on the by-pass road at Hadleigh. The plaintiff was apparently badly injured, and his claim is a heavy one. A statement of claim has been delivered and the time is overdue to deliver a defence. We have informed the plaintiff's solicitors that as a receiving order has been made,

C. A. 1928 — HOOD'S TRUSTEES v. SOUTHERN UNION GENERAL INSURANCE CO. OF AUSTRAL-ASIA.

and that the position of the action must be brought to your notice, we maintain that the bankrupt is no longer in a position to give us instructions, and that the receiving order has automatically stayed the proceedings. The plaintiff's solicitors do not agree with this, and from their attitude we imagine that unless a defence is delivered they propose to sign judgment in default of defence. Will you please let us have your instructions as the official receiver in bankruptcy, as to what you wish us to do in the action? Do you wish us to deliver a defence, and do you desire to defend the action? With regard to the likelihood of the plaintiff's solicitors signing judgment, do you agree that the action is automatically stayed by the receiving order? It must be borne in mind that the action is one of tort, and that no judgment has yet been obtained. So far as we can see a claim for damages for tort is not provable in the bankruptcy, unless judgment has been obtained prior to the bankruptcy. As we have no one to give us instructions, and as you are the official receiver dealing with the estate of the bankrupt, and in our view stand in his shoes, we write this letter to you in the hope that you will let us know what you wish to be done. . . . ."

On October 23, the following day, the official receiver replied, stating that in his view the plaintiff Caddy did not appear to have any right of proof, and that it was doubtful if he could acquire one by obtaining judgment. He himself therefore did not propose to take any part in the action brought by Caddy. Upon the defendant company's solicitors asking the bankrupt what he proposed to do regarding the claim of Caddy, the bankrupt informed them by letter on November 5 that he did not intend giving them any further information or assistance in the matter. To this the defendant company's solicitors on November 6 replied stating that under the policy it was his duty to give the company every assistance in defending any proceedings brought against him, and that " as you are not prepared to give the insurance company the assistance they are entitled to under the policy, the company instructs us to say that they are not prepared

to do anything further or to indemnify you in respect of this claim. Please, therefore, understand that you must face the claim yourself and at your own expense. . . . . We are prepared to advise the company to pay to you a sum of, say, 50*l.*, to assist you, but in this case the policy must be cancelled and given up. You must clearly understand however that the insurance company have finished with the claim of Caddy once and for all, and you will have to take over the case and face any judgment which Caddy may obtain against you."

On November 7 the bankrupt informed the defendant company's solicitors by letter that he agreed to accept 50*l.* from the defendant company in settlement of all claims he might have against them and also in respect of the claim of Caddy, and would release the defendant company from any liability to him. To this letter the defendant company's solicitors replied on November 9, saying that they enclosed a form of receipt which it would be necessary for the bankrupt to sign in exchange for the 50*l.*, and on his signature being obtained the 50*l.* would be paid over by the defendant company.

On November 10 the bankrupt duly signed the receipt (the 50*l.* having been paid over), the terms of which were as follows: "I the undersigned Alfred Hood . . . . hereby acknowledge to have received of the Southern Union General Insurance Company of Australasia Ld., the sum of fifty pounds in full settlement of all claims under my third party insurance policy with them, and particularly in settlement of all claims, made or to be made against me by Mr. William John Caddy, of . . . ., who was knocked down by my motor car in the by-pass road, Hadleigh, Essex, on December 27, 1924; and also in full settlement of all claims or sums of money he may recover against me, in certain proceedings brought by him in the High Court of Justice, King's Bench Division, against me to recover damages for such alleged personal injuries. I hereby release the said insurance company from all liability to me under my policy of insurance with them in respect of the said accident to the said William John Caddy, both as to damages (if any) he might recover, and as to any legal costs claimed by

C. A. 1928 — HOOD'S TRUSTEES v. SOUTHERN UNION GENERAL INSURANCE CO. OF AUSTRAL-ASIA.

him. I further hereby agree that the insurance company shall be under no liability whatever to further conduct my defence of the said proceedings or in any way deal with the said claim of the said William John Caddy or to indemnify me in respect thereof under my said policy."

On November 16 the bankrupt surrendered the policy to the defendant company.

On February 8, 1926, judgment was obtained by Caddy against the bankrupt for the sum of 643*l.* 11*s.* 1*d.* damages and costs.

On April 25, 1926, the bankrupt committed a second act of bankruptcy, and a receiving order was made on June 23, the order of adjudication following on July 29, and the trustee thereby appointed was the second named plaintiff in the action against the defendant company.

On October 6, 1926, the writ was issued by the trustee in the bankrupt's second bankruptcy claiming a sum of 643*l.* 11*s.* 1*d.* on behalf of the bankrupt as due by the defendant company under their policy of insurance. This sum was in fact the amount of the judgment and costs awarded to the injured man Caddy in his action against the bankrupt.

By an order of Astbury J. dated October 25, 1927, it was ordered (inter alia) that all further proceedings in the action be carried on by the trustees in the first and second bankruptcies of the bankrupt as joint plaintiffs, and that amended pleadings be delivered between the parties.

The plaintiffs accordingly claimed jointly, and, in the alternative, respectively in the first and second bankruptcies as the trustees of the property of the bankrupt (*a*) a declaration that the defendant company was liable to indemnify the bankrupt and/or the plaintiffs against the said loss of 643*l.* 11*s.* 1*d.*, suffered by the bankrupt in respect of which the defendant company undertook by the policy of insurance issued by them and current at the time of the said loss to indemnify the bankrupt; (*b*) the said sum of 643*l.* 11*s.* 1*d.*; and (*c*) a declaration that the alleged agreement and surrender of the policy were void and of no effect.

The defendant company denied that any right of action existed under the circumstances in the trustee under the bankrupt's first bankruptcy, and they contended further that such trustee was estopped by his letter of October 23, 1925, from alleging that any right of the bankrupt to claim the indemnity under the policy of insurance had passed to him as such trustee. They also denied that any rights under the said policy of insurance, passed to the trustee under the bankrupt's second bankruptcy or to the plaintiffs jointly.

The action came on before Tomlin J. on February 1, 1928.

Tom Eastham K.C. and *Day Kimball* (*G. Malcolm Hilbery* with them) for the plaintiffs. The plaintiffs are claiming jointly in the two bankruptcies of Hood, but the real right of action lies in the first plaintiff, trustee under the bankruptcy of October 9, 1925. Under the policy issued by the defendant company the right to claim the indemnity arose on the happening of the accident to Caddy; this right is a chose in action, and passed on the bankruptcy to the official receiver as the trustee. One must look at the Bankruptcy Act, 1914, ss. 38 and 167, to see what constitutes "property of the bankrupt." At the date of the bankruptcy there was an asset—namely, the obligation of the defendant company to indemnify: *In re Perkins.* (1) A policy of assurance is a "chose in action": *Ex parte Ibbetson.* (2) If the question of the Statutes of Limitation had arisen, the obligation to indemnify would run from the date of the accident: *Hibbert* v. *Martin* (3); Welford on Accident Insurance, p. 228.

The cause of action arises on the happening of the contingency insured against. The right of action passes to the trustee in bankruptcy: *Ponsford, Baker & Co.* v. *Union of London and Smith's Bank.* (4)

Further it is submitted the agreement of November 10, 1925, whereby the bankrupt Hood purported to release the defendant company, was null and void; it was not made for valuable consideration or in good faith.

(1) [1898] 2 Ch. 182, 187.
(2) (1878) 8 Ch. D. 519.
(3) (1808) 1 Camp. 538, 539.
(4) [1906] 2 Ch. 444, 452.

C. A. 1928 — HOOD'S TRUSTEES v. SOUTHERN UNION GENERAL INSURANCE CO. OF AUSTRAL-ASIA.

Clayton K.C. and *A. E. Woodgate* for the defendants. There is no right of action in the plaintiffs arising out of Hood's bankruptcy against the defendant company in respect of the indemnity contained in the policy.

[TOMLIN J. If the benefit of the policy is assigned the assignee can only claim the indemnity to the extent the third party is injured.]

That is so. The right arises on the payment of the money.

[TOMLIN J. What is the effect of assignment by the assured of the benefits under the policy to a third party ?]

It would amount to an assignment in equity. In this particular policy the obligation of the company must be taken into account; it is an indemnity against liability for compensation.

[TOMLIN J. The liability arises at the time an accident happens.]

Yes, but in this particular case it does not depend on the accident but on the negligence (if any) shown by the injured man, Caddy. At the moment of the accident the defendants were under no liability to indemnify Hood; the policy is an indemnity policy. Hood could have sued the defendant company the next day after the accident on the contract of indemnity. In *In re Perkins* (1) there was a provable liability. In *In re Richardson* (2) it was held the trustee in bankruptcy had to pass on the money to the principal creditor, but the circumstances were different from those in the present case.

Even if the right of indemnity vested in the trustee in bankruptcy, the trustee can only take it subject to all the obligations of the bankrupt, Hood, one of which was that he should give all information possible to the defendant company, and this he has not properly done. Further, the official receiver by his letter of October 23 has disclaimed the policy, and has thereby estopped himself from asserting the claim. The defendant company were entitled to repudiate their liability.

Eastham K.C. in reply. A chose in action can be transferred: *Lloyd* v. *Fleming* (3); Welford on Accident Insurance,

(1) [1898] 2 Ch. 182, 183. (2) [1911] 2 K. B. 705, 711, 713.
(3) (1872) L. R. 7 Q. B. 299, 302, 303.

pp. 153, 157, n. (*a*). A case however very like this is *In re Harrington Motor Co.* (1), where it was held that the money payable by an insurance company was distributable among all the creditors of a company which was being wound up and which had insured itself against third party risks.

As to the breach of condition precedent and its waiver, see *In re Bradley and Essex and Suffolk Accident Indemnity Society.* (2) Here there was no breach of the condition to give the required information to the defendant company; the condition was limited to a defined purpose, and the assured Hood complied with its terms.

TOMLIN J. This is an action in which the trustee in bankruptcy of one, Alfred Hood, under a bankruptcy, the date of adjudication of which was October 9, 1925, together with the trustee of the same bankrupt under a later bankruptcy of July 29, 1926, sues the Southern Union General Insurance Company of Australasia, Ld., an Australian company, for a declaration that a certain agreement entered into between the defendant company and Hood, the bankrupt, is null and void; and for a declaration that the defendant company are liable to indemnify Hood against a certain loss and apparently for payment of the amount of that indemnity.

Now the case is a somewhat curious and unusual one, and the facts are these. [His Lordship stated the facts and the correspondence substantially as set out above and continued:]

Now the case of the plaintiffs, or rather of the first plaintiff, because so far as I can see it is not suggested that the second plaintiff has any interest in the action at all, is shortly this: It is said, here is a man who had a policy under which he had a right of indemnity, and an accident occurred within the policy; that is to say, one which brought into operation the right to indemnity; his right arising on the occasion of the accident. That right of indemnity was a chose in action and property, and being a chose in action and property, passed to and vested in the trustee in the first bankruptcy. The claim of Caddy, the injured man in the accident, against

(1) 44 Times L. R. 58; since reported ante, p. 105.

(2) [1912] 1 K. B. 415, 417, 421.

C. A. 1928 — HOOD'S TRUSTEES v. SOUTHERN UNION GENERAL INSURANCE CO. OF AUSTRAL-ASIA. — Tomlin J.

Hood was a claim for damages for a tort; a liability not provable in the first bankruptcy, unless judgment had been obtained for the amount before the first bankruptcy; and inasmuch as there was no judgment until long after the first bankruptcy, Caddy's claim could never be provable in the first bankruptcy. So that the position was this: Caddy could recover a judgment and could not prove for it in the first bankruptcy; any right in respect of that judgment, which Hood had against the defendant company, being a chose in action, had vested in the trustee of the first bankruptcy. So that the trustee in the first bankruptcy gets the indemnity, and the claimant against Hood gets his judgment, but apparently with little prospect of anything else; except so far as there may be a surplus in the first bankruptcy, available through the medium of the second bankruptcy (in which Caddy's claim would be provable), towards the satisfaction of that claim. Now that seems a very remarkable position. As it seems to me it does not differ substantially from the position in *In re Harrington Motor Co.* (1) In that case the applicant obtained judgment against a limited company for damages for personal injuries and costs. Afterwards the company went into liquidation, and the insurance company with which the company in liquidation was insured, paid the amount of the damages and costs to the liquidator, and it was held that the applicant was not entitled to have the amount in question paid to him by the liquidator, but it formed part of the assets for distribution among the general creditors, including the applicant. In giving judgment Atkin L.J. said that he thought that the appellant had a real grievance; but the general rule of law was too strong to allow the Court to make any exception, however the Court might sympathize with the appellant. The position in law was quite clear, and it was that the appellant had no right or claim against the insurance company or against money paid by the insurance company. The assured had a direct right of recourse against the insurance company, but a third party had no such right, because there was no privity between

(1) 44 Times L. R. 58; since reported ante, p. 105.

him and the insurance company, and it was difficult to see how a special right could be said to exist against the insurance company, or any right to claim money paid over by the insurance company, merely because the assured happened to be in financial difficulties. Then he cites the judgment of Buckley L.J. in *In re Law Guarantee Trust and Accident Society* (1), in which that learned judge said : " The equitable doctrine is that the party to be indemnified can call upon the party bound to indemnify him specifically to perform his obligation, and to pay him the full amount which the creditor is entitled to receive, and that whether having received it he applies it in payment of that creditor or not is a matter with which the party giving the indemnity is not concerned. In such a case the party indemnified is entitled to receive 20*s.* in the pound, and, having got it, to deal with it as he thinks proper." Later, referring to *Carr* v. *Roberts* (2), he added : " The case is that which is put in *Carr* v. *Roberts* (2), where both Littledale and Patteson JJ. at the conclusion of their judgments point out that it is the duty of the defendant to pay the whole amount, and it makes no difference whether it is applied in discharge of the debt, or whether the plaintiff, having recovered it, does not make a proper use of it." Atkin L.J. continued ; " Kennedy L.J. goes still further into the matter and says : How the person who receives payment of a sum of money under a contract of insurance or re-insurance, or, I will add, of indemnity, deals with that sum is, in general and apart from special consideration, no concern of the party who, in fulfilment of his contract, has made the payment to him. Upon what grounds of equity or legal logic can it be argued that, because the law, on grounds of public policy, compels the creditor, the liability to whom is the event upon which the right of a bankrupt or of an insolvent company to payment of the sum covered by the contract arises, to be content with such share of the assets of the bankrupt or the company in liquidation as a pari passu distribution between creditors will give, these assets are not to include the payment due under

(1) [1914] 2 Ch. 617, 633, 639. (2) (1833) 5 B. & Ad. 78, 84, 85.

C. A. 1928

HOOD'S TRUSTEES v. SOUTHERN UNION GENERAL INSURANCE CO. OF AUSTRAL-ASIA.

Tomlin J.

the contract ?," "That seems to me," said Atkin L.J., "to be a direct statement by the learned Lord Justice; indeed a statement of the law that the third party is compelled by the law to be content with such a share of the assets as a pari passu distribution between the creditors will give." Then Lawrence L.J., who also came to the same conclusion, said in the course of his judgment that counsel for the appellant had based his case almost exclusively upon the decision in *In re Richardson.* (1) He (the Lord Justice) added that he found it rather hard to follow the principles laid down in *In re Richardson* (1), but he thought that they did not seriously question the general principle that a man could not claim an interest in a contract to which he was not a party. Now so far as this case is concerned everything which has been said applies here. Caddy, the injured man, had no interest in the policy, he could make no claim under it, and he had no right legally to complain if the money paid by the insurance company under the policy to Hood was dealt with by Hood in some way other than payment of Hood's obligation to Caddy. Caddy could in no circumstances claim the money, and equally it seems clear that any right which Hood had under the policy against the defendant company was a right of property or a chose in action, and as such would vest in a trustee in bankruptcy. It seems to make no difference in principle, whether the person whose claim gives rise to a claim for indemnity, is able against the assured to claim a dividend in the bankruptcy of the assured, or whether his claim is not provable in that bankruptcy at all—that seems to make no difference. *In re Harrington Motor Co.* (2) was the case of the liquidation of a company in which the claimant was in the position of being able, at any rate, to claim a dividend, he did get something out of it, he could not claim to be paid in full, but he could claim his dividend. Here, by reason of the fact that the particular claim is not provable in this bankruptcy, he will never get anything in this bankruptcy, he cannot make a claim in this bankruptcy, but that does not seem to affect the principle.

(1) [1911] 2 K. B. 705. (2) 44 Times L. R. 58, 59; since reported ante, p. 105.

Now the case which has been relied upon here is the case which was also relied upon in the Court of Appeal, in *In re Harrington Motor Co.* (1)—namely, *In re Richardson.* (2) I feel rather as Lawrence L.J. felt in regard to *In re Richardson.* (2) I am not quite able to appreciate it, but at any rate it was a different case from this: It was a case where there was a husband who held leasehold premises as trustee for his wife, and the wife as beneficial owner was liable to indemnify her husband against any claim of the landlord under the covenants in the lease. The landlord obtained a judgment for 711*l.* against the lessee, that is the husband, for rent and damages for breach of covenant, but the lessee, before the amount of his liability was ascertained, was adjudicated a bankrupt. The landlord obtained leave in the bankruptcy to commence an action in the joint names of the trustee in bankruptcy and himself to recover the 711*l.* from the wife under the lessee's right of indemnity, but without prejudice to the question whether the money so recovered should be treated as assets in the bankruptcy or be retained by the landlord. The action was brought and was compromised by the payment by the wife of 520*l.*, and it was held that the trustee in bankruptcy could only avail himself of the right of indemnity for the purpose of passing on the money to the principal creditor, and that consequently the landlord was entitled to retain the money on account of his debt.

That is no doubt a different case. It rests on the equitable right, which every trustee has, to be indemnified by his cestui que trust, and it may be that there are distinctions between such a case and cases like *In re Harrington Motor Co.* (1) and the one now before me. I have a difficulty in seeing that *In re Richardson* (2) has any application to this case. At least if I have to choose between *In re Richardson* (2) and *In re Harrington Motor Co.* (1)—and I have some difficulty in seeing how they can be reconciled—I think I must take the principles which are indicated in *In re Harrington Motor Co.* (1) as being the more appropriate to the particular case

(1) 44 Times L. R. 58, 59; since reported ante, p. 105. (2) [1911] 2 K. B. 705.

C. A. 1928

HOOD'S TRUSTEES v. SOUTHERN UNION GENERAL INSURANCE CO. OF AUSTRAL-ASIA.

Tomlin J.

I am now deciding. The result of that is that I must come to the conclusion—however unfortunate—that in fact the benefit of the indemnity vested in the trustee, notwithstanding that the claim of Caddy was not provable in the first bankruptcy.

Then it is said, that although that may be so, the company were, in the events which happened, entitled to repudiate and did in fact repudiate their liability. Now of course the result of the conclusion that the benefit of the indemnity was vested in the trustee is this, that it could not be got rid of by any agreement between the defendant company and Hood, and that, therefore, the transaction of November 10, 1925, so far as it was a transaction which attempted to determine the liability of the defendant company (inasmuch as it was made with the wrong person), did not affect the liability of the defendant company, and the defendant company remained liable on the policy, unless in fact they are right in their contention that they were entitled, by reason of the conduct of Hood, the assured, to repudiate and did repudiate liability. They rested their contention on this, that Hood failed to comply with his obligations under clause 1 of the conditions of the policy; and that his failure to comply with those conditions made it impossible for them to continue the defence to the action; and that, that being so, they were entitled to repudiate and did in fact repudiate liability.

Now I do not think it is necessary for me to determine whether or not this was a condition precedent which would entitle the defendant company to repudiate; nor indeed, whether the facts were such as in fact entitled the defendant company to repudiate. I am quite satisfied, upon the true construction of the correspondence which I have read, that there never was in fact any repudiation. What was done was this: a bargain was entered into between the parties under which, in consideration of 50*l.*, Hood released the company from all claims in respect of the claim of Caddy, and from all other claims under the policy. Repudiation of the claim would not have relieved the company from

liability in respect of any other claim which might have arisen under the policy, but by this bargain with Hood they got rid of the policy, and they got rid of the difficulty of a repudiation on the ground of breach of obligation, because it is obvious that they would have been on very unsafe ground if they had relied solely upon an alleged right to repudiate, based upon a breach of Hood's obligation. They secured themselves by entering into a bargain with him under which, for the 50*l.*, they got a release in respect of all matters. It seems to me it is impossible to read the letters and the documents and to come to any other conclusion than that that is the true construction of it. It is not open to the defendant company to go behind the terms of the release of November 10. It was prepared by them, and the meaning of it seems to me to be plain. The result of that is that it is not open to the defendant company to say that they had repudiated the claim.

Now one other point was raised—namely, that the trustee is estopped from asserting the claim, basing that upon the letters of October 22 and 23. Estoppel is a very subtle thing. Estoppel is only established on the clearest grounds. It seems to me that this is a case where it would be impossible to say that the official receiver was estopped from asserting any claim to the policy, because he was asked whether he wished to defend an action brought by the injured man against the assured—was asked that and that alone—and was never told anything about the policy at all. All he was told was that an insurance company was defending the action, and the company desired to know whether he wished to give instructions for the defence of the action or whether they were free to take instructions from the assured Hood. It seems to me quite impossible to hold that he was estopped by anything that occurred on that day.

The result, therefore, seems to be this, that the first trustee is entitled to any sum which the defendant company are bound to pay under the policy, and to that extent the action succeeds. The action, so far as it is an action by the second trustee, seems to me to have no basis in fact at all; and as

C. A. 1928

HOOD'S TRUSTEES v. SOUTHERN UNION GENERAL INSURANCE CO. OF AUSTRAL-ASIA.

regards the second trustee it seems to me the action must fail and ought to be dismissed.

A. R. T.

The defendants appealed. The appeal was heard on June 14, 15, 1928.

Clayton K.C. and *A. E. Woodgate* for the appellants repeated the arguments used by them in the Court below.

Tom Eastham K.C., *Malcolm Hilbery K.C.* and *Day Kimball* for the respondents were not called upon to argue.

LORD HANWORTH M.R. This appeal fails. The truth is that when one comes to consider the decision in *In re Harrington Motor Co.* (1), which is binding upon this Court, the task that Mr. Clayton and Mr. Woodgate have had imposed upon them is really an impossible one. Once it is realized that the bankrupt, who had taken out his policy of insurance for his own purposes, was possessed of a chose in action, as in *In re Harrington Motor Co.* (1), then it is clear that it passes as part of the estate to his trustee in bankruptcy. For my part, I am content to agree with Tomlin J.'s judgment in what he has said and in the conclusions which he has reached.

I will only add that it seems to me that the point with regard to repudiation of the contract was unarguable. That receipt of November 9, to my mind, quite clearly was a composition of a then-existing liability understood to be such by the insurance company, and with regard to the amount that ought to be paid to them, I think the action of Tomlin J., in accepting the figures, which were ascertained at the trial, is the right one.

For these reasons, I think that the appeal fails and must be dismissed with costs.

LAWRENCE L.J. I agree. I am content to rely upon the judgment of Tomlin J., as it seems to me to be correct in every particular.

(1) Ante, p. 105.

RUSSELL L.J. I agree. I am neither desirous nor capable of adding anything useful to Tomlin J.'s judgment.

C. A. 1928 HOOD'S TRUSTEES v. SOUTHERN UNION GENERAL INSURANCE CO. OF AUSTRALASIA.

Appeal dismissed.

Solicitors: *Leonard Bingham & Sharp; Corner & Co.*

W. I. C.

In re WILTS AND SOMERSET FARMERS, LIMITED.

ROMER J. 1928 *April* 30; *May* 7, 8, 24.

[00169 of 1923.]

Industrial and Provident Society—Alteration of Rules—Ultra vires—Liability of Members to take additional Shares—Contract between Members and Society—Voluntary Liquidation—Liability to contribute—Cessation of Membership—Industrial and Provident Societies Act, 1893 (56 *&* 57 *Vict. c.* 39).

By rule 12 of the rules of a society, registered in 1910 under the Industrial and Provident Societies Act, 1893, it was provided as follows: "Individual members shall hold at least one share for every 20 acres or fraction of 20 acres farmed by them up to 500 acres, and at least three shares for every 40 acres or fraction of 40 acres above 500. . . . . Milk retailers shall hold at least six shares for every churn of 17 gallons retailed daily by them."

By rule 23 it was provided: "If by transfer or otherwise the number of shares held by a member becomes less than the number required by rule 12 to be held by him, the amount paid up on the shares shall be repaid and the shares cancelled, and the member shall cease to be a member."

In November, 1921, rule 12 was amended by requiring a member to hold at least five shares for every 20 acres or fraction of 20 acres, and milk producers were required to hold shares on the above acreage basis or at least five shares for every dairy cow owned by them, whichever should be the greater number of shares.

Rule 23 was amended as follows: "Rule 23, line 4—Strike out the word 'shall' [i.e., the word 'shall' preceding the words 'be repaid'] and substitute 'may at the discretion of the committee.'"

On March 25, 1922, rule 12 was further amended by substituting for "five shares" "shares of the nominal value of 5*l.*"

On January 30, 1923, Wilts and Somerset Farmers, Ld., went into liquidation, and the liquidator took out a summons against five representative members of the society as respondents for the determination of the question whether, having regard to rule 12, as amended, the respondents, or some of them, and which of them, should be placed

ROMER J.

1928

WILTS AND SOMERSET FARMERS, *In re.*

on the list of contributories. Each of the respondents joined the society before March 25, 1922 :—

Held, (i.) that rule 12 and its amendments were not void for uncertainty, and that the alterations made to rule 12 were binding on the respondents. (ii.) That it could not have been intended, by the amendment to rule 23, that a member to whom the rule applied should cease to be a member whether the committee did or did not repay the amount paid up on his shares and cancel them, and that the words at the end of the rule must be taken to mean "and shall in that case cease to be a member."

Biddulph and District Agricultural Society v. *Agricultural Wholesale Society* [1925] Ch. 769; [1927] A. C. 76 considered.

Dibble v. *Wilts and Somerset Farmers, Ld.* [1923] 1 Ch. 342 referred to.

SUMMONS.

On March 23, 1910, the society known as "Wilts and Somerset Farmers, Ld.," was registered under the Industrial and Provident Societies Act, 1893.

By the society's original rules and amendments it was, so far as material, provided as follows :—

(6.) Shares shall be transferable, but not withdrawable. They shall be of the nominal value of 1*l*., of which 5*s*. shall be payable on application, and the remainder in such calls as the committee may direct.

(11.) The society shall consist of the persons by whom the application for registration is signed (hereinafter called the special members) and such other persons, societies or companies, as the committee may admit.

(12.) Individual members shall hold at least one share for every 20 acres or fraction of 20 acres farmed by them up to 500 acres, and at least one share for every 40 acres or fraction of 40 acres above 500. In arriving at the acreage Down Land may be eliminated at the discretion of the committee. Milk retailers shall hold at least six shares for every churn of 17 gallons retailed daily by them, societies or companies which are members shall hold at least five shares. Societies (other than the Agricultural Organization Society, Ld.) or companies which are members, shall hold at least five shares.

(13.) The total number of shares held by any member (other than a registered society) shall not exceed 200*l*. in nominal value.

(18.) No transfer of shares shall be valid unless the committee's consent has been obtained thereto, and the transfer is made in the form provided in rule 20. A non-member to whom shares are transferred with the committee's consent shall thereby become a member of the society, provided he holds a sufficient number of shares to qualify for membership in accordance with rule 12.

(22.) The committee may, on the application of a member, in case of distress or removal from the district or for other good reason, repay on any share held by him a sum not exceeding the amount paid up and cancel the share.

(23.) If by transfer or otherwise, the number of shares held by a member becomes less than the number required by rule 12 to be held by him, the amount paid up on the shares shall be repaid and the shares cancelled and the member shall cease to be a member.

(64.) The rules may be amended by resolution or a three-fourths majority at a special general meeting. No amendment of rules shall be valid until registered.

By an amendment registered on November 14, 1921, the whole of rule 12 was rescinded and the following rule substituted therefor: "Individual members shall hold at least five shares for every 20 acres or fraction of 20 acres farmed by them up to 500 acres and at least three shares for every 40 acres or fraction of 40 acres above 500. In arriving at the acreage Down Land may be eliminated at the discretion of the committee. Milk producers shall hold shares on the above acreage basis or shall hold at least five shares for every dairy cow owned by them whichever shall be the greater number of shares."

Rule 23 was also altered by striking out the word "shall" before the words "be repaid" and substituting the words "may at the discretion of the committee."

On December 21, 1921, the following further alterations to the rules were registered: "Rule 6. Strike out the words following 'drawable' in line two and substitute therefor: 'They shall be of the nominal value of 6*s.* 8*d.*, which shall be payable upon application'"; and, "After rule 6, insert

ROMER J. 1928 WILTS AND SOMERSET FARMERS, *In re.*

the following additional rule: 'Rule 6A. The nominal value of each of the issued and fully paid shares of the society shall be reduced from the sum of 1*l.* to the sum of 6*s.* 8*d.* by cancelling the sum of 13*s.* 4*d.* upon each share. Each of the shares of the society which have been issued and are not fully paid shall likewise be reduced to the nominal value of 6*s.* 8*d.*, but so that the existing liability in respect of unpaid capital on such shares respectively shall not be extinguished or reduced.'"

On March 25, 1922, rule 12, as amended on November 14, 1921, was further amended by substituting for the words "five shares" in the two places in which they occurred the words "shares of the nominal value of 5*l.*"

On January 30, 1923, the society went into voluntary liquidation. The liquidator took out a summons, in which five representative members, each of whom joined the society before March 25, 1922, were made respondents, for the determination of the question whether, having regard to the rules and the amendments thereto, the respondents, or some of them, and which of them, should be placed on the list of contributories.

Greene K.C., *Rowland Thomas* and *Renfield* for the liquidator. The question is whether certain changes in the rules of the society, under which existing members became under a liability to acquire further shares, are binding on members who did nothing after the alterations and whose assent could be inferred. The theory is that, when farmers join a society of this kind, as their acreage or the number of their cows increases, their demands increase and they should provide the capital. In *Dibble* v. *Wilts and Somerset Farmers, Ld.* (1), Lawrence J. held that a rule of this kind was ultra vires the society, as it involved a breach of the principle of limited liability. That decision has since been overruled: *Agricultural Wholesale Society* v. *Biddulph and District Agricultural Society.* (2) A distinction between this case and *Dibble's* case (1) is that the respondents in the present

(1) [1923] 1 Ch. 342. (2) [1925] Ch. 769; [1927] A. C. 76.

case did not take up any shares after the rules were altered. In *Dibble's* case (1), as Lawrence J. declared the original rule void, the question of the validity of the alterations did not arise for decision. In *Biddulph's* case (2) it is clear that the judgments in the Court of Appeal would not have been delivered in the form in which they were delivered if that Court had not intended to hold that the alterations were binding.

[They also referred to *Sidebottom* v. *Kershaw, Leese & Co.* (3); *McEllistrim* v. *Ballimacelligott Co-operative Agricultural and Dairy Society* (4); *In re Borough Commercial and Building Society* (5); and *Strohmenger* v. *Borough of Finsbury Permanent Investment Building Society.* (6)]

Gavin Simonds K.C. and *Andrewes-Uthwatt* for one of the respondents. An alteration of the rules of this society by which a member is bound to take a larger share than that which was originally prescribed is invalid. In *Biddulph's* case (1) the Biddulph Society had become a member of the Agricultural Wholesale Society. An alteration was made in the rules requiring them to take up more shares. They did so. They were then required to take up further shares. At that they cavilled, but they were not in a position to quarrel with the rule. It was not necessary to consider the position of a member who did not assent. The members in the present case did not enter into a bargain that if they held the same number of acres they should incur an additional liability. The form of the present action is in fact that of an action against the members for breach of contract. It is necessary to ascertain the exact nature of the contract. There is no obligation for these members to remain members of the society and to subscribe for new shares. The rules themselves prescribe that if a member does not conform to them he shall cease to be a member. If the rule to that effect is valid, then, if a member ceases within a reasonable time to take up a proper number of shares, he ceases to be a member.

(1) [1923] 1 Ch. 342.
(2) [1925] Ch. 769; [1927] A. C. 76.
(3) [1920] 1 Ch. 154.
(4) [1919] A. C. 548.
(5) [1893] 2 Ch. 242, 252.
(6) [1897] 2 Ch. 469.

ROMER J.
1928
WILTS AND SOMERSET FARMERS, *In re.*

Vaisey K.C. and *H. S. G. Buckmaster* for other respondents. The differences between *Dibble's* case (1) and *Biddulph's* case (2) are very great. The observations in Lord Sumner's speech in the latter case support the contention that the alterations in the present case are not binding. The final result of that case amounts to a qualified overruling of *Dibble's* case. (1)

Alan Ellis for another respondent.

Greene K.C. in reply referred to *Molineaux* v. *London, Birmingham and Manchester Insurance Co.* (3)

Cur. adv. vult.

May 24. ROMER J. This is a summons by the liquidator of a society called the Wilts and Somerset Farmers, Ld., asking for the determination by the Court of certain questions that have arisen on the settling of the list of contributories of the society. The answers to be given to the questions depend upon the validity of one of the rules of the society and certain amendments to that rule that were made from time to time.

The society was registered on March 23, 1910, under the Industrial and Provident Societies Act, 1893, and on January 30, 1923, it went into voluntary liquidation. By the original rules it was, so far as material, provided as follows: [His Lordship read rules 6, 11, 12, 13, 18, 22 and 23.] The only other rule that it is necessary to refer to is rule 64, which provided: "The rules may be amended by resolution of a three-fourths majority at a special general meeting. No amendment of rules shall be valid until registered." In pursuance of the rule last mentioned the original rules were from time to time amended. By an amendment registered on November 14, 1921, the whole of rule 12 was rescinded and the following rule substituted therefor. [His Lordship read the amended rule.] Rule 23 was also altered by striking out the word "shall" before the words "be repaid" and

(1) [1923] 1 Ch. 342. (2) [1925] Ch. 769; [1927] A. C. 76.
(3) [1902] 2 K. B. 589.

substituting the words " may at the discretion of the committee." It will be seen that this new rule 12, if valid, imposed upon members who farmed land the obligation to hold five times as many shares as they held before, and that it is " milk producers " and not " milk retailers " upon whom an obligation is now placed to hold shares in the society. The next alteration to the rules was registered on December 21, 1921. The material part is as follows: " Rule 6. Strike out the words following ' drawable ' in line two and substitute therefor: ' They shall be of the nominal value of 6*s.* 8*d.*, which shall be payable upon application ' " ; and, " After rule 6, insert the following additional rule: ' Rule 6A.' " [His Lordship read rule 6A.] This was, of course, a reduction of the society's capital. There is, however, nothing in the provisions of the Industrial and Provident Societies Act that expressly prohibits such a reduction, and I know of nothing in that Act or elsewhere that can be considered as prohibiting it by implication. No one has suggested before me that the reduction was made in bad faith or for any improper purpose, and I must treat it as being valid. The result of it, however, has proved to be somewhat unfortunate for many of those who were at that time members of the society, if the next alteration is to be held binding upon them. For that alteration, which was registered on March 25, 1922, amended rule 12 as amended on November 14, 1921, by substituting for the words " five shares " in the two places in which they occurred the words " shares of the nominal value of 5*l.*" The effect of this was to impose on most of the existing members the obligation of considerably increasing their shareholding, and in the case of many of them an obligation to increase it three-fold. Several of the members raised no objection to having this additional liability imposed upon them and applied to the society for the allotment to them of the additional shares required to raise their holding to the standard required by the amended rule. Many others, however, including one Dibble, challenged the right of the society to compel them to take up further shares, and for the purpose of having

ROMER J. 1928 WILTS AND SOMERSET FARMERS, *In re.*

the question determined Dibble commenced an action against the society claiming, amongst other relief, a declaration that rule 12 as altered by the respective amendments was ultra vires and not binding on him, or, in the alternative, that rule 12 in its original form was invalid. This action came before Lawrence J., and he decided that rule 12 was void both in its original form and as amended. See *Dibble* v. *Wilts and Somerset Farmers, Ld.* (1), where the headnote is as follows: "The contract of membership in a society registered under the Industrial and Provident Societies Act, 1893, carries with it the right on the part of the society to make and alter its rules determining (inter alia) the amount of interest (not exceeding 200*l.*) in the shares of the society which any member may hold. But that right is subject to the fundamental principle governing the constitution of the society. Therefore, as there is a provision in the Act of 1893, which has its counterpart in the Companies (Consolidation) Act, 1908, that in the winding up of such a society no contribution can be required from any member exceeding the amount unpaid on the shares in respect of which he is liable, the principle laid down in *Ooregum Gold Mining Company of India* v. *Roper* [1892] A. C. 125 and *Welton* v. *Saffery* [1897] A. C. 299 with regard to the limit of the liability of members of limited companies applies to the liability of members of industrial and provident societies; and applying, mutatis mutandis, the principle of *Bisgood* v. *Henderson's Transvaal Estates* [1908] 1 Ch. 743, 759, which was applied to a limited company, to a society registered under the Industrial and Provident Societies Act, 1893, any attempt to define the constitution of such a society in such a manner as that a member should be, in some event, liable for any larger sum than the amount, if any, unpaid on his shares in respect of which he is a member, is a breach of the Act of 1893, and is ultra vires; and any rule, whether original or amended, which seeks to impose on a member the alternative of accepting liability for a larger sum or of being dispossessed of the status of a member is ultra vires."

(1) [1923] 1 Ch. 342.

It was held in that case " that the rule "—that is rule 12— " both in its original form and as amended, was ultra vires and void, because it purported to impose a liability on the member, in certain events, to acquire further shares in the society's capital." Inasmuch as, in his opinion, the rule in its original form was void, it followed as a matter of course that he should hold it to be void in its amended form. The learned judge did not consider, and in the circumstances did not have to consider, the further question whether, supposing the original rule was valid, the amendments to that rule which purported to increase the shareholders' obligations under that rule were nevertheless invalid. In consequence of this decision no further attempts were made for the time being either by the society or by its liquidator to impose the further liability upon the objecting members. In April, 1925, however, the Court of Appeal gave its decision in the case of the *Agricultural Wholesale Society* v. *Biddulph and District Agricultural Society* (1), a case that was, except for one feature to which I will call attention later, on all fours with *Dibble's* case. (2) It came in the first instance before Lawrence J., who followed his previous decision. His decision was, however, overruled by the Court of Appeal, to whose judgments I shall have to refer later. For the moment it will be sufficient to read the headnote of the report. It is as follows: " A collateral obligation imposed by the rules of a society registered under the Industrial and Provident Societies Act, 1893, or by the articles of association of a limited company registered under the Companies (Consolidation) Act, 1908, upon a member of the society or company, which in certain events involves a liability on the part of that member to take further shares in the society or company, can be enforced notwithstanding that the liability of the member to contribute in a winding up is limited by the Act under which the society or company is registered. The limitation of liability in respect of shares held is distinct from an obligation collaterally imposed upon a member in certain events to take up further shares which

(1) [1925] Ch. 769. (2) [1923] 1 Ch. 342.

ROMER J. 1928 WILTS AND SOMERSET FARMERS, *In re.*

will themselves, when taken up, be entitled to a similar limitation of liability. There is nothing in such a collateral obligation which is ultra vires or repugnant to the system of limited liability." The case was taken to the House of Lords, where the decision was affirmed for reasons to which I will presently call attention. *Dibble's* case (1) had, however, been overruled in terms by the Court of Appeal, and, though as between Dibble and the society the matter was, of course, res judicata, the liquidator was advised that it was his duty, so far as regards the other members of the society, to treat them as bound by the amended rules. Hence this summons, to which five contributories have been made respondents. The first of them is Lord Bath, who became a member of the society in January, 1920, and took up 100 shares of 1*l.* each. This he did with a view to assisting his tenants. He was, however, at the time when the amendment of November 14, 1921, came into force, a milk producer owning forty dairy cows, and if that amendment was valid should have acquired another 100 shares. On March 25, 1922, he was still the owner of forty dairy cows, and was accordingly required by the society to take up another 500 shares of 6*s.* 8*d.* each, so as to make his holding of the nominal value of 200*l.* He declined to do so, and the liquidator now seeks to place him on the list of contributories in respect of those 500 shares. The next respondent, Martin, is in a similar position. He joined the society in June, 1920, and became the holder of fifty shares. But in November, 1921, and in March, 1922, he was the owner of thirty dairy cows. He never increased his shareholding, however, and the liquidator seeks to put him on the list in respect of 400 shares. The next respondent, Hole, is in a slightly different position. In March, 1921, he held 200 1*l.* shares and could not, therefore, hold any more. He was, however, willing to take up and pay for another 71 shares, and the society accordingly registered such shares in the name of his brother as his nominee. When the shares were reduced to 6*s.* 8*d.* each Hole did not, as he might have done, require his brother to transfer the 71 shares to him,

(1) [1923] 1 Ch. 342.

but allowed them to continue registered in his brother's name. It appears that Hole is the owner of forty dairy cows. He should, therefore, if the amendment of March 25, 1922, be binding upon him, be the holder of 600 shares of 6*s.* 8*d.* each; and the further question arises in his case whether the liquidator should put him on the list of contributories for 400 shares or only for 329 shares, treating the 71 shares as his. I may as well deal with this further question at once. Sir Gilbert Garnsey, in para. 18 of his affidavit, states the point in this way: "By proviso (*a*) to s. 4 of the Industrial and Provident Societies Act, 1893, and rule 13 of the society's rules, the total number of shares held by any member (other than a registered society) shall not exceed 200*l.* in nominal value. It appears to have been the practice of the society's officials, when a member offered or was willing to subscribe for shares beyond the statutory limit, to evade the restriction by putting the additional shares in the name of the member's wife or other near relative. No doubt the society's officials took this course because they believed the consequent increase in its membership and funds to be in the best interests of the society. When the shares were reduced in nominal value from 1*l.* to 6*s.* 8*d.* each, and further sums were called up under the amended rule 12, the society appears to have treated the member's wife or other relative in such cases as the member's nominee, and therefore in assessing the member's liability to take up further shares, gave him credit in respect of shares standing in the name of his wife or other relative. The liquidator has adopted the same course, the effect being in some cases to extinguish the member's liability to take up further shares. The liquidator desires to be advised whether his policy in this matter is correct." In my opinion the liquidator's policy has been the correct one. When the amendment of March 25, 1922, came into force the further obligation purporting to be imposed upon the members could have been discharged either by applying for new shares or by obtaining a transfer of shares already issued. Inasmuch as the 71 shares had been placed in the brother's name for their benefit and

ROMER J. 1928 WILTS AND SOMERSET FARMERS, *In re.*

at their instance, the society could not have refused to register a transfer of the shares into Hole's name, and, that being so, I think that the liquidator should now treat him as though this had been done. The respondents Rich and Watts are in a similar position to Lord Bath and Martin, except that they joined the society after the first and second alterations to the rules had been made, and at all material times held the number of shares required by rule 12 as affected by those alterations. The really material matter is that all the respondents joined the society before March 25, 1922.

In these circumstances the question arises whether the amendment to rule 12 of March, 1922, is binding upon the respondents; for it is not, and after the decision in the *Agricultural Wholesale Society's* case (1) it could not, be contended that rule 12 in its original form was invalid. The question to be decided is, therefore, the one which, as already pointed out, Lawrence J. did not decide in *Dibble's* case. (2) But was it decided in the *Agricultural Society's* case? (1) In order to see whether this was so or not it is necessary to consider the facts of that case. They were as follows. The plaintiff society had been registered under the Industrial and Provident Societies Act, 1893, and carried on business as the Central Trading Federation for agricultural co-operative societies, of which the defendant society was one. The defendant society was also registered under the Act of 1893 as an industrial society. The defendant society in 1914 applied for admission to membership of the plaintiff society and was allotted two shares. The reason why it was allotted two shares was that under the rules of the society, which were registered, the basis on which other societies could become members of the plaintiff society was that they had to take a quota of shares—namely, one share for fifty members of the constituent society. At that time there were in the defendant society some sixty members, and so, in accordance with the rule, the quota of shares that it would have to take, being one for every fifty members or less, would be two, because their numbers were sixty; and accordingly the

(1) [1925] Ch. 769. (2) [1923] 1 Ch. 342.

defendant society took them. Now at that date (1914) certain rules were in force. Rule 9 was that "Each society or company which is a member shall hold at least one share for each 50 (or fraction of 50) of its members." Rule 59 provided a method by which amendment of rules could be effected. Then later (in 1918) there was an alteration of its rules, and, in accordance with the alteration of the rules, the condition of membership was this: "Every existing member shall within three calendar months after the 1st June, 1918, take up such a number of shares in the A. W. S. as together with the existing shares of such member in the A. W. S. will make up the number of shares which such society, if a new member, would have had to take up." And by sub-clause (*c*) of that rule 6 it was provided that "Every allotment society hereafter admitted to membership"—that is as a new member —"shall take up at least one share of 1*l.* in the A. W. S. for every twenty members in such allotment society and additional shares of an amount taken at the par value thereof equal to 2 per cent. on its turnover as below defined." In accordance with the amendment of the rule in 1918 as a matter of fact the defendant society took up a total number of shares of 472. That figure was ascertained by applying the standard set out in rule 6 (*c*) to the number of members and the turnover at that time of the defendant society. But the number of members and the turnover of the defendant society continued to increase, with the result that by the year 1923 the number of shares held by them fell short of the quota required by the amendment of 1918 by 2211 shares. The defendant society refused to take up or pay for those shares, and the action was brought by the plaintiffs for the purpose of compelling them to do so. It is important to observe that the defendants had applied for the 472 shares in compliance with the very same rule as that under which it was sought to fix them with the liability to take up the 2211 shares. It would seem, however, that the Master of the Rolls was under a misapprehension as to this, and was under the impression that the further liability was imposed by an amendment to the rules made in 1922. This was of no

ROMER J. 1928 WILTS AND SOMERSET FARMERS, *In re.*

materiality in view of the grounds upon which he and the other members of the Court of Appeal decided the case, though the fact that the further liability was one imposed by the 1918 rule became a material consideration when the case was before the House of Lords. It was, moreover, the basis of the plaintiff society's alternative contention before the Court of Appeal. For the plaintiffs presented their appeal upon two grounds: first, that an obligation to take the 2211 shares arose under the rules, and, alternatively, that there was a contract to take them quite apart from the rules, the contract being one to be implied from the circumstances in which they applied for the 472 shares, which circumstances are stated in Lord Sumner's speech in the House of Lords. It was, however, on the first of these grounds alone that the Court of Appeal, consisting of the Master of the Rolls, Warrington and Sargant L.JJ., decided the appeal in the plaintiffs' favour. I have read their judgments with great care, and it is apparent that they were all directed to a consideration of the question whether the rules of the society were invalid in so far as they imposed a liability upon its members to take up further shares in certain events. They did not in terms consider whether there was any distinction for the purpose between an original rule and one introduced by amendment. But the Court must have been of opinion that there was not, otherwise their decision would have been in the respondents' favour. The respondents had no doubt assented to the amendment of the original rule by subscribing for additional shares in obedience to it. This was not, however, a material consideration for the decision of the appellants' first point. The rule was either valid or invalid. It is inconceivable that, qua rule, it would bind those members who had assented to it whether by voting in its favour or otherwise, and would not bind those who had voted against it or dissented from it in some other way. But, even though, qua rule, it were invalid, its terms could nevertheless be incorporated into a contract made by a member with the society outside the rules altogether, and such was the contract upon which the society based its second contention. It is

moreover to be observed that in the statement of facts on p. 770 of the report, which statement was taken from Pollock M.R.'s judgment, these words appear : " In accordance with the alteration of the rules, which were binding upon the then constituent members of which the defendant society was one." Pollock M.R. too, as already pointed out, treated the obligation to take the additional shares as one that arose under the amendment of 1922, and there was no evidence that the respondent had ever assented to that amendment. In the end the Court of Appeal made a declaration substantially in these terms: " that under or by virtue of an agreement under rule 6 of 1918 and in the events which have happened the defendants became and were at the date of the issue of the writ in this action liable to take 2211 shares of 1*l.* each in the plaintiff society, and that the name of the defendant society was rightly entered in the plaintiff society's books as the holder of those shares." It has been necessary to consider thus closely the grounds for the decision of the Court of Appeal, as it was contended before me that notwithstanding that decision it was still open to me to decide that the obligation sought to be imposed upon the respondents to the present summons could not be introduced into the rules by way of amendment. In my opinion I am bound by the decision of the Court of Appeal in the *Agricultural Wholesale Society's* case (1) to hold that the obligation can be so imposed, unless that decision is no longer binding in view of what took place when that case came before the House of Lords. As already stated, the decision of the Court of Appeal was affirmed, but so far as Lord Cave and Lord Sumner, at any rate, were concerned, it was affirmed on the society's second or alternative contention. Lord Cave stated the respondent society's contention to be that the only question to be determined was whether the appellants, having accepted the rules of the society as altered in the year 1918 and taken shares upon the footing of those rules, could now dispute their liability to take up additional shares in accordance with those rules. He added that reference was also

(1) [1925] Ch. 769 ; [1927] A. C. 76, 83, 84, 88, 92.

ROMER J. 1928 WILTS AND SOMERSET FARMERS, *In re.*

made by them to s. 22 of the Act of 1893. It will be seen, therefore, that Lord Cave referred to both the appellant society's points, putting, however, the alternative one in the foreground. Lord Cave then proceeded as follows: "In my opinion the contention of the respondents, which has been accepted by the Court of Appeal, is right, and the appellants are under a contractual obligation to take up the additional 2211 shares." I have felt some difficulty in this reference to the Court of Appeal, for the alternative contention of the society had not been dealt with by either the Master of the Rolls or Warrington L.J., and Sargant L.J. had expressed some doubts as to whether it could be maintained; and as to the contention that had in fact prevailed in the Court of Appeal, Lord Cave said: "It is unnecessary for the purposes of this appeal to decide whether, having regard to the terms of the Industrial and Provident Societies Act, 1893, an alteration of the rules of a registered society requiring the members of the society to subscribe for additional shares would be binding on a member who had not assented to the alteration; for the case of the respondents rests, not on any alteration of rules made after the appellants took up their shares, but on the rules of 1918, which were in force when the appellants subscribed for 470 shares." Lord Sumner agreed with the Lord Chancellor that the real question was whether the appellants were bound by contract to take up the additional shares and that the answer depended on the construction of the rules and on the communications which passed between the parties with respect to them. He then proceeded as follows: "The amended rules of 1918 purported to require the appellants to take up further shares. Letters then were written drawing their attention to these requirements, and in reply they asked, on August 20, 1918, how many shares they ought to take up. Being told 470, on the application of the new rule to their then membership and turnover, they sent in reply on October 28 the first instalment of the sum to be paid and afterwards the balance. The form of application, which had been sent for their use, was not signed or returned, but it contained words of agreement 'hereby to

subscribe and pay' for so many shares and of further agreement 'from time to time to subscribe and pay for such further shares as the rule requires.' The letters which the appellants actually sent contained nothing to show that the 470 shares were applied for otherwise than on the footing of the amended rule and of this form. I think that the appellants impliedly accepted the amendment of 1918 and agreed to perform it, as circumstances might arise from time to time, and that this obligation became contractually enforceable upon them by action. This being so the respondents were entitled to judgment. I think, however, for my part, and I submit to your Lordships, that it would be prudent to make a variation in the judgment appealed from in order to make it conform to your Lordships' decision. The Court of Appeal, in addition to ordering payment of the amount due on the shares, the subject of the action, added a declaration substantially in terms suggested by counsel for the respondents. They had argued that the case turned, firstly, on an obligation to take the shares and, secondly, on a contract quite apart from the rule; and they relied mainly on the first point. The declaration is that 'under or by virtue of the agreement contained in r. 6 of 1918 . . . . and in the events which have happened, the defendants became liable.' The 'events which have happened' seem to refer and to refer only to the further increase in the membership and turnover of the appellants' society after the 470 shares were taken up. So, at any rate, I read the judgments delivered in the Court of Appeal. The Master of the Rolls says: 'throughout, the rules being binding upon the defendants, they have contracted with the plaintiff society that the nature of their association with that society is to be such as will be determined by the characteristics which they themselves enjoy.' Warrington L.J. says: 'The obligation is found in the rules, which were in force at all material times' . . . . (and after quoting the amended rule) 'there is no dispute that . . . . if that rule is valid and binding, the defendant society became liable to apply for and take up 2211 further shares.' Sargant L.J. says: 'The action was founded upon alternative

ROMER J.
1928
WILTS AND SOMERSET FARMERS, *In re.*

grounds : first, that an obligation to take the shares arose by virtue of the rules of the plaintiff society, and secondly, that it was a contract to take them, altogether apart from the rules. As regards the second alternative cause of action, I think it unnecessary to say anything, having regard to the fact that I consider the plaintiffs have established their cause of action on the first ground.' " Then Lord Sumner went on : " Furthermore, I wish to point out that throughout these judgments no mention is made of the letters above referred to or of the significance of the voluntary act of the appellants in applying and paying for 470 shares, as evidence of their actual agreement to take further shares, contingently on the happening of the necessary events in the future. I agree with the Lord Chancellor that it is not necessary now to decide whether an alteration of this sort in the rules would be binding on a member who had not assented to the alteration, but it is a question so important and, to me at any rate, requiring such strong argument to support an affirmative answer, that I think the declaration made should not be left unamended, lest it should prejudice the consideration of that question, should it ever arise, and I would suggest the insertion of the words ' the correspondence between the parties with reference to ' between the words ' contained in ' and the words ' r. 6 of 1918.' I agree that *Dibble's* case (1) was wrongly decided on the point then dealt with—namely, the repugnancy of such an amendment in itself to the whole character and scheme of limited liability." I am told, however, that no such variation in the order of the Court of Appeal was ever in fact made. Lord Shaw said that in his opinion the order of the Court of Appeal and the reasons therefor stated by the Lords Justices were right and that he agreed with the judgment of the Lord Chancellor. Lord Parmoor said : " The only question for the decision of your Lordships is whether a special rule which in certain events places an obligation on the appellant society to subscribe for and take up additional shares, is inconsistent with the provision of the Act of 1893 which qualifies the liability of

(1) [1923] 1 Ch. 342.

members on winding up by the enactment that no contribution shall be required from any individual, society, or company exceeding the amount, if any, unpaid on the shares in respect of which he or it is liable as a past or present member," and he agreed with the decision of the Court of Appeal that there was no such inconsistency. Lord Blanesburgh said that he agreed for the reasons given by the Lord Chancellor that the appeal should be dismissed, but he in no way dissented from the decision of the Court of Appeal upon the first point. It would appear, indeed, from the observations that he made that he agreed with it.

In these circumstances I am of opinion that notwithstanding the doubt expressed by Lord Sumner, and whatever may be my own views, I at any rate am bound to hold that the alterations made to rule 12 in the present case were binding upon the respondents.

It only remains to deal with two comparatively minor points made by the respondents to the summons. It is said that the liability to acquire further shares was incapable of enforcement, inasmuch as by reason of rule 23 as amended they ceased to be members when they failed to acquire such shares within a reasonable time after the liability arose. To this the liquidator replied that the rule only applies to members who by reason of parting with shares already held by them cease to hold the required number. I do not think that the liquidator is right as to this. A member who after an increase of his acreage or his dairy cows no longer holds the number of shares required by the rules is in my opinion within the rule. It is true that the number of the shares formerly held by him is not thereby altered. But none the less, by reason of the alteration in his circumstances that number, in my opinion, becomes less than it should be within the meaning of the rule. I do not, however, think that even so the rule has the effect for which the respondents contend. When the rule was amended in November, 1921, and the words " may at the discretion of the committee " were substituted for the word " shall " where first used, the word " shall " in the next line was left unaltered. I cannot, however, assent

ROMER J. 1928 WILTS AND SOMERSET FARMERS, *In re.*

to the contention that a member to whom the rule applies ceases to be a member whether the committee do or do not repay the amount paid up on his shares and cancel them. If the committee decides that they shall not be cancelled it cannot have been intended that the member should nevertheless cease to be a member. It seems to me to be the more natural construction of the rule to treat the words at the end of it as meaning "and shall in that case cease to be a member."

The respondents finally contend that rule 12 and its amendments are void for uncertainty, inasmuch as the number of cows owned by a member may vary from month to month or even from week to week. But the number of cows owned by a member at any particular time can always be ascertained. There can be no uncertainty about it. It may be inconvenient or even absurd that a member should have to increase his shareholding in consequence of his herd of cows being increased for a few days only. But I cannot hold that a rule which produces such a result is thereby rendered void for uncertainty.

A further question might have arisen, namely, whether the members of the society who failed to increase their shareholding in accordance with the rules ought now to be placed upon the list of contributories in respect of the extra shares that they ought to have acquired, or whether the liquidator is only entitled to an inquiry as to the damages that the society has suffered by reason of such failure. The pecuniary consequences to the respondents would, however, in all probability be much the same in either case, and I have, therefore, been relieved by their counsel of the necessity of deciding this question.

In these circumstances, and for the reasons I have given, I must hold that the respondents should be placed on the list of contributories in respect of the number of shares shown opposite their respective names in the schedule to the summons.

Solicitors: *Stephenson, Harwood & Tatham; Farrer & Co.; Ernest Bevir & Son, for H. Bevir & Son, Wootton Bassett; Mead & Co., for Frederic Wood & Son, Wrington.*

J. L. D.

In re the Application of CRANBUX, LIMITED.

CLAUSON J.

[1928. C. 313.]

1928 *March* 22.

Trade Mark—Assignment—Goodwill of Business concerned in Goods for which Trade Mark registered—Duty of Registrar in investigating Title of Assignee —Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 22, 33, 35—*Trade Marks Act*, 1919 (9 & 10 *Geo.* 5, *c.* 79), *s.* 11.

Upon the application, in pursuance of s. 33 of the Trade Marks Act, 1905, as amended by s. 11 of the Trade Marks Act, 1919, by a person entitled by assignment to a registered trade mark to register his title, the registrar in the investigation of the title is not entitled to go behind the terms of the assignment, and will adequately discharge his duties if he satisfies himself that, upon the true construction of the assignment, there is an assignment of the trade mark in connection with the goodwill within the territorial limits to which the Act extends, of the business concerned in the goods for which the trade mark is registered.

MOTION.

The Lingner Werke Aktiengesellschaft carried on business as manufacturers and dealers in, amongst other articles and preparations, a dentifrice known as "Odol," and had their manufactory at Dresden. They carried on business in Great Britain under the style of "Odol Chemical Works," and were the registered proprietors in Great Britain of certain trade marks, including trade marks used in connection with "Odol." That business was wound up by the Board of Trade in 1916, under the Trading with the Enemy legislation, with the result that any goodwill connected with the business in Great Britain was brought to an end.

On October 11, 1927, in pursuance of a previous agreement with Lingner & Co. and the promoters, Cranbux, Ld., was incorporated and adopted the agreement. And by a deed dated October 17, 1927, and made between Lingner & Co. (hereinafter called "the assignors") and Cranbux, Ld., after a recital that the assignors had for some time past carried on business as proprietors and manufacturers of and dealers in a dentifrice known as "Odol" and other articles and preparations of a proprietary nature and were the registered proprietors of the trade marks used in connection therewith

CLAUSON J.

1928

CRANBUX, LD., *In re the Application of.*

and had established within the territories thereinafter mentioned a valuable goodwill in connection with the same business, it was thereby witnessed that the assignors assigned to Cranbux, Ld., the goodwill of the assignors in Great Britain and certain other agreed territories therein specified, together with certain scheduled trade marks of which the assignors were the registered proprietors and which included the "Odol" trade marks. The deed contained covenants by the assignors not to manufacture or sell within or export into the agreed territories any Lingner products; that Cranbux, Ld., should have the right to represent themselves as the assignor's successors in business in the agreed territories, and to do all acts necessary to enable Cranbux, Ld., to be entered on the register of trade marks in those territories as the proprietors of the trade marks thereby assigned.

All goods sold by the assignors after the termination of the war and by Cranbux, Ld., after the assignment to them were manufactured by the assignors in Germany.

On November 3, 1927, Cranbux, Ld., alleging that by virtue of the assignment of October 17, 1927, they were entitled to the trade marks and the goodwill of the business concerned in the goods with respect to which the marks were registered, requested the registrar to enter their names on the register as the proprietors of the trade marks so assigned.

Sect. 33 of the Trade Marks Act, 1905, as amended by s. 11 of the Act of 1919, requires that the registrar, on proof of the title of the assignee to his satisfaction, should register him as the proprietor of the trade mark. The registrar refused to register Cranbux, Ld., as proprietors of the trade marks in question on the ground that all the goods manufactured and sold since the war had been manufactured in and exported from Germany, and that the manufacturing part of the business was wholly in Germany and no manufacturing section of the business was assigned; that the marks had been separated from the manufacturing and vending business in connection with which they had been used, so that the manufacturing business which Cranbux, Ld., were about to set up, although under the sanction of the

assignors, in Great Britain was a new business: see Fry L.J. in *Pinto* v. *Badman* (1), and that therefore the assignors had not assigned the goodwill of their manufacturing business or any severable part of it to Cranbux, Ld.

This was a motion by Cranbux, Ld., for an order reversing the decision of the registrar, and directing him to enter the applicants as proprietors of the trade marks. There was also a motion by the assignors under s. 35 of the Trade Marks Act, 1905, for an order that the register might be rectified by expunging therefrom the name of the assignors as proprietors of the trade marks and by inserting instead the name of Cranbux, Ld., as the proprietors thereof.

Sir Duncan Kerly K.C. and *Evans-Jackson* for the applicants. The real question is whether the marks can be assigned with the English goodwill. The registrar is obliged to register on proof of title: see s. 33 of the Trade Marks Act, 1905, and rr. 70 to 76 of the Trade Mark Rules, 1920. His only duty under that section is to consider the title and the assignment of the goodwill; it is no part of his duty to consider whether the future user of the mark may prove deceptive; that is no part of his jurisdiction. Sects. 22 and 23 of the Act provide for the division of the goodwill; the German company could assign the whole of their business to the English company, who could then reassign the foreign portion of the business. The goodwill assigned is the goodwill in this country. Goodwill is not necessarily local or attached to a particular factory. "Odol" means a particular product, and does not mean the manufacturer. As Lord Macnaghten said in *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine* (2), it is difficult to localize goodwill where the reputation of the business is widely spread or where it is the article itself rather than the producer which has won popular favour; the goodwill of a business is one whole and cannot be split into its component parts.

Whitehead K.C. and *Donald H. Cohen* for the German company. The assignors have done their best to put the

(1) (1891) 8 R. P. C. 181, 194, 195. (2) [1901] A. C. 217, 224.

CLAUSON J.
1928
CRANBUX, LD., *In re the Application of.*

assignees in their shoes; there is no attempt to sever the vending and manufacturing goodwill.

Stafford Crossman for the Registrar of Trade Marks. In considering the proof of the applicant's title under s. 33 of the Act, the registrar is thrown back upon s. 22, and has to consider whether there was a valid assignment. The assignment is not in connection with the whole of the goodwill; the applicants do not bring their case within the proviso to s. 22 nor within s. 23. The Act seems to have been based on the language of Lord Cranworth in *Leather Cloth Co.* v. *American Leather Cloth Co.* (1), where he says: "The right to a trade mark may, in general, treating it as property or as an accessory of property, be sold and transferred upon a sale and transfer of the manufactory of the goods on which the mark has been used to be affixed, and may be lawfully used by the purchaser." The assignment, upon its proper construction, and having regard to the recitals, includes goodwill of manufacturing and vending business, except the manufacturing and vending business in Germany; therefore, the whole of the goodwill is not assigned. The business has been entirely carried on in Germany, and the assignment seems to indicate that the business is still being carried on there and that the assignors have the same rights in Germany as they had before the assignment.

CLAUSON J. The first of these matters is a motion by Cranbux, Ld., by way of appeal under s. 33 of the Trade Marks Act, 1905, as amended by s. 11 of the Trade Marks Act, 1919, from a decision of the registrar refusing to register the applicants as proprietors of certain trade marks. The present registered owner of the trade marks may for the moment be treated as being Lingner Werke Aktiengesellschaft. The second matter is a motion by Lingner Werke Aktiengesellschaft under s. 35 of the Act, asking, in effect, that Cranbux, Ld., be substituted for the applicants as proprietors of the trade marks. In my view a question whether or not an assignment from the existing proprietor is one

(1) (1865) 11 H. L. C. 523, 534.

which gives a good title to an applicant for registration ought normally to be raised by way of appeal from the registrar's decision under s. 33, and ought not to be raised by an application by the assignor under s. 35. However, in the present case I need not go into this point further. The applicants will in each case have to bear the registrar's costs, and the order for payment of those costs will be the only order on the second motion.

On the first motion the question for determination arises on an indenture of October 17, 1927, by which the existing proprietor of the trade marks, whom I will call the assignor, assigned to the applicants, whom I will call the assignees, the goodwill of the assignor in, among other countries, Great Britain, in connection with the assignor's business as proprietor and manufacturer of and dealer in a dentifrice known as "Odol" and other articles and preparations of a proprietary nature, together with the trade marks now in question, which are registered in respect of the appropriate classes of goods. The question is whether, within the meaning of s. 22 of the Act, the document assigns the trade marks in connection with the goodwill of the business concerned in the goods for which the trade marks have been registered.

On the face of it there can, I think, be no question that the assignment is good and effective within the Act. It must be borne in mind that the Act operates within certain territorial limits, being the limits to which it is expressly or impliedly confined by the legislature. It operates so as to give the registered proprietor under s. 39 the exclusive right to use the trade mark within those territorial limits, as to which it is material only to say that Great Britain is, of course, included. The Act, by s. 22, makes it essential that the trade marks should be assigned only in connection with the goodwill of the business concerned in the goods for which it has been registered, but goodwill in this section must mean goodwill within the territorial limits to which the Act extends; the Act is in no way concerned with goodwill outside those limits. It is such first mentioned goodwill which is assigned by the document now in question. The existence of a goodwill

CLAUSON J. 1928 CRANBUX, LD., *In re the Application of.*

within Great Britain, is, of course, perfectly consistent with the possibility of the owner of the business having no place of business within Great Britain.

The difficulty which the registrar felt in the matter was this. He ascertained that the goods in question have hitherto, or at all events recently, been manufactured abroad, and he felt doubts as to whether the assignment might not involve some alteration in the business as heretofore carried on which would jeopardize the identity between the goodwill heretofore enjoyed in England by the assignor and the goodwill to which the assignees have become entitled by the assignment. The facts raising these doubts seem to have been ascertained by the registrar partly from information volunteered by the assignees and partly from information which had been communicated to the registrar or his predecessor in connection with an earlier application by a third party for registration of a trade mark somewhat similar to the main trade mark now in question, an application which had failed. I do not propose to consider whether these doubts were or were not well founded. Neither the registrar nor this Court seem to me, for the purpose of the matter now in hand, to have any concern with these suggested facts, nor indeed to have any evidence of them upon which they can rely. The registrar is bound, under s. 33 of the Trade Marks Act, 1905, as amended by s. 11 of the Act of 1919, in investigating the title of the assignee, to satisfy himself that, as between the assignor and the assignee (who are, of course, bound by the document of assignment), there is, on the true construction of the document, an assignment of the trade marks in question in connection with the goodwill, within the territorial limits to which the Act extends, of the business concerned in the goods for which the trade marks are registered; but the registrar will, in my opinion, adequately discharge his functions under that section if he satisfies himself that this appears to be so, on the true construction of the document which binds the assignor and the assignee. It may be (as was found ultimately to be the position in regard to the trade mark which was the subject-matter of the

proceedings in *Lacteosote, Ld.* v. *Alberman* (1)) that an assignment which is, on its true construction, effective as between assignor and assignee, will turn out, when the true facts are ascertained (and they are not likely to be fully ascertained except in proceedings brought by some third party), to have the indirect or even the direct result of destroying the trade mark by causing it to become deceptive. In the present case there is not before the registrar or the Court any evidence which either binds or enables the registrar or the Court to go behind the terms of the assignment; and, in my view, neither the registrar nor the Court is entitled to call for any such evidence. If there are any facts which will enable a case to be made out that the result of the assignment has been or will be to destroy the trade mark, the registration of the assignees as proprietors under s. 33 as amended will not prevent these facts being brought out in the proper manner in proceedings by an aggrieved party.

I am thus of opinion that the registrar ought to have accepted the assignment as sufficient in respect of the trade marks of which the Lingner Werke Aktiengesellschaft are proprietors. One of the trade marks is apparently registered in some other name, and it remains for the registrar to be satisfied in regard to the title to that mark.

It seems to me that a convenient order to make will be an order reciting that the Court is of opinion that, as between Cranbux, Ld., and the Lingner Werke Aktiengesellschaft, the document of October 17, 1927, is a valid and effective assignment within s. 22 of the Act, of the trade marks expressed to be thereby assigned, and directing that the matter be referred back to the registrar for further hearing, and ordering Cranbux, Ld., to pay the registrar's costs of their motion. On the second motion there will be no order, except that the applicants pay the registrar's costs.

Solicitors: *Collisson, Prichard & Barnes; Bull & Bull; Solicitor to Board of Trade.*

(1) [1927] 2 Ch. 117; 44 R. P. C. 211.

H. C. H.

Applied. JONES *v.* BELLEGROVE PROPERTIES, LTD. [1949] 2 All E.R. 198.

Approved. JONES *v.* BELLEGROVE PROPERTIES. [1949] 2 K. B. 700

CLAUSON J.

1928

July 5.

In re ATLANTIC AND PACIFIC FIBRE IMPORTING AND MANUFACTURING COMPANY, LIMITED.

VISCOUNT BURNHAM *v.* ATLANTIC AND PACIFIC FIBRE IMPORTING AND MANUFACTURING COMPANY, LIMITED.

[1928. A. 601.]

Limitation of Action—Specialty Debt—Debentures—Acknowledgment—Balance Sheets in Notices and Reports signed by Directors stating Liability under Debentures—Civil Procedure Act, 1833 (3 *&* 4 *Will.* 4, *c.* 42), *ss.* 3, 5.

A balance sheet contained in an annual report sent by a company to its shareholders and filed with the Registrar of Companies and stating the total amount of the company's indebtedness under its debentures for principal and interest accrued thereon since their issue is, although not sent to the debenture holders, a sufficient acknowledgment by the company of its liability under the debentures to take the case out of the operation of s. 3 of the Civil Procedure Act, 1833.

THE company, which was incorporated in 1883, during a period between 1890 and 1902 raised 23,925*l.* 8*s.* 6*d.* by the issue of debentures. Each debenture, including the plaintiff's, which was issued to him on November 19, 1890, and was for 1110*l.* 11*s.* 8*d.*, contained a covenant that the company would, on a date therein fixed (being two years after the date of the debenture), pay to the person named therein, or other the registered holder thereof for the time being, the principal sum therein mentioned, and that the company would in the meantime pay to such registered holder interest at 10 per cent. per annum by half yearly payments. The plaintiff brought this action on behalf of himself and all other holders of the debentures, for an account of what was due to them for principal and interest, and for payment of what should be found due.

The plaintiff by his statement of claim alleged that no part of the principal sums respectively secured by the debentures, nor any interest, had ever been paid by the company, which the company admitted, and that the whole

of the principal sums, with interest accrued thereon, was due and owing to the registered holders, which was denied by the company. The defence of the company was that the claim was barred by s. 3 of the Civil Procedure Act, 1833. The plaintiff by his reply set up acknowledgment of the debts through the publication of balance sheets which were issued for each of the years ending December 31, 1907, to 1926, inclusive, signed by one or more of the directors and the secretary of the company, and incorporated in the notice of the annual general meeting, and in the report for each of those years. Each balance sheet stated the following liability of the company—namely: "On debentures, 23,925*l.* 8*s.* 6*d.*" And the balance sheet in the report for the year ending December 31, 1926, contained, under the heading "Sundry creditors," the following entry: "Accrued interest on debentures, 80,733*l.* 2*s.* 7*d.*" That sum represented the aggregate amount of interest accrued and unpaid on all the issued debentures, at the rate of 10 per cent., as from the dates on which the debentures were respectively issued.

The notices and reports incorporating the balance sheets were sent to the plaintiff and those other debenture holders who happened also to be shareholders of the company, but were not sent to those debenture holders who were not shareholders, and a print of the balance sheet so signed by the directors was filed in each year with the Registrar of Companies.

C. L. Fawell for the plaintiff. The publication of the balance sheets in the reports admitting the amount due on the debentures is sufficient acknowledgment within the meaning of s. 5 of the Civil Procedure Act, 1833. Under that Act, the acknowledgment to be effective need not amount to a promise to pay and need not be made to the person claiming the money, as in the case of an acknowledgment of a simple contract debt under Lord Tenterden's Act of 1828. Under the Act of 1833 it may be effectively made alio intuitu, and is, in effect, a withdrawal of the abrogation of the remedy

CLAUSON J. 1928 ATLANTIC AND PACIFIC FIBRE IMPORTING AND MANUFACTURING CO., *In re.* VISCOUNT BURNHAM *v.* ATLANTIC AND PACIFIC FIBRE IMPORTING AND MANUFACTURING CO.

and leaves the old debt still recoverable at law: *Moodie* v. *Bannister* (1); *In re Lacey* (2); and *Read* v. *Price.* (3)

A. P. Vanneck for the company. The directors of the company desire the protection of the Court. The statement in the company's reports is not sufficient to constitute such an acknowledgment as that contemplated by s. 5 of the Act of 1833, in the absence of any reference to the persons to whom the moneys are owing by the company. It is not permissible to investigate entries in the company's registers for the purpose of constituting statements in the reports as acknowledgments of their indebtedness under a particular debenture to the holder thereof. There must be some limit placed to the extent to which evidence may be adduced to make an acknowledgment effective; that is to say, for the purpose of connecting the claiming creditor with the debt—e.g., if a debtor admits that he owes 1000*l.*, the claiming creditor cannot set up such admission as an acknowledgment within the Act, by proving from the debtor's own books that the debtor owed only 1000*l.* if his claim is taken into account.

[*In re Severn and Wye and Severn Bridge Ry. Co.* (4) was referred to.]

CLAUSON J. [after stating the facts as set out above continued as follows:] The question to be decided is whether the statements in the balance sheets contained in the notices and reports constituted an acknowledgment within the meaning of s. 5 of the Civil Procedure Act, 1833. It was contended on behalf of the defendant company that it was essential, in order to take a case out of the operation of s. 3 of that Act, that the acknowledgment should be given to the obligee or person entitled to bring the action, and that, as in the present case, the report containing the balance sheet was not sent by the company to all the debenture holders, there was no acknowledgment sufficient to satisfy the requirements of s. 5 of the Act. But that Act, dealing as it does with specialty debts, does not in terms require that the acknowledgment should be given to the claiming creditor, and the

(1) (1859) 4 Drew. 432.
(2) [1907] 1 Ch. 330.
(3) [1909] 2 K. B. 724.
(4) [1896] 1 Ch. 559.

acknowledgment need not amount to a fresh promise to pay. In those respects an acknowledgment to be made under that Act differs from an acknowledgment which the Act known as Lord Tenterden's Act of 1828 requires to be in writing. That was an acknowledgment of a simple contract debt with which the Act of James was concerned. It was essential that it should be made to the person claiming to enforce it and should amount to a fresh promise to pay. The total amounts acknowledged in the balance sheet in the report for the year 1926, which is signed by directors and the secretary of the company, to be liabilities of the company under the debentures are exactly the respective amounts actually due for principal and accrued interest at the rate of 10 per cent. to the holders of the debentures from the respective dates of their issue. In my judgment the issue of the balance sheets constituted, in the circumstances, a sufficient acknowledgment of the company's indebtedness to the plaintiff and the other debenture holders under the debentures. There will be a declaration that their claims for principal and interest against the defendant company are not barred by any statute of limitation, and there will be liberty to apply.

Solicitors for all parties: *Alfred Cox & Son.*

H. C. H.

C. A. 1928 June 25.

M. WHEELER AND COMPANY, LIMITED *v.* WARREN.

[1928. W. 112.]

Company—Debenture—Receiver—Appointment by Debenture Holder—Power conferred by the Debenture on the Receiver to "get in property . . . . charged" —Company's Contract for Sale of Land—Receiver's Right to sue in Company's Name.

A company incorporated with the object of erecting and selling houses issued a debenture to secure a loan with further advances and charged its undertaking and all its property (present and future) by way of floating charge with payment thereof. Clause 5 of the debenture gave the lender power at any time after the principal moneys secured became due to appoint a receiver and manager of the property charged. Clause 6 provided: "A receiver and manager so appointed shall be the agent of the company and shall have power . . . . to take possession of and get in the property hereby charged . . . ." :—

Held, that a receiver when duly appointed had an implied power to sue in the name of the company for the purpose of getting in any property charged. He could therefore bring an action in the company's name in which the relief asked was rescission of a contract entered into by the company for the sale of a house in course of erection and forfeiture of the deposit or, alternatively, specific performance.

Appeal from the Vice-Chancellor of the County Palatine Court of Lancaster.

The plaintiffs, M. Wheeler & Co., Ld., were incorporated on February 5, 1927, with a nominal capital of 200*l.* divided into 200 shares of 1*l.* each, for the purpose of erecting and selling houses. On September 16, 1927, the plaintiffs issued a debenture to David Horwich to secure a loan of 75*l.* and all money thereafter advanced by the lender to the company with interest thereon at 12½ per cent. per annum, and charged its undertaking and all its property (including uncalled capital and goodwill) by way of floating security with payment thereof.

Clause 5 of the debenture provided that "the lender may at any time after the principal moneys hereby secured shall have become payable appoint by writing under his hand any person to be receiver and manager of the property hereby charged."

Clause 6 provided: "A receiver and manager so appointed shall be the agent of the company and shall have power—

(1.) To take possession of and get in the property hereby charged. . . . .

(4.) To make any arrangement or compromise which he shall think expedient and to do any other act or thing which a receiver appointed under s. 109 of the Law of Property Act, 1925, would have power to do."

On September 23, 1927, Marshall Wheeler, acting as agent for the plaintiffs, entered into an agreement for the sale to the defendant, Mrs. Sarah Ann Warren, of a leasehold house in course of erection in Lime Road, Stratford, for 850*l.*, and she paid a deposit of 350*l.* On November 18, 1927, the debenture holder appointed Joshua Ralph Atkins to be receiver and manager of the property charged by the debenture, the principal moneys having become immediately payable under clause 3 of the debenture.

On May 5, 1928, the receiver issued the writ in this action in the name of the company, claiming:—

(1.) Rescission of the agreement of September 23, 1927, and forfeiture of the deposit paid on the signing of the agreement.

(2.) In the alternative specific performance of the said agreement.

On May 10, 1928, the defendant moved for an order that the name of the plaintiffs might be struck out and all further proceedings in this action stayed, "the same having been commenced without the authority of the said company." The receiver claimed to be entitled to bring the proceedings in the name of the plaintiffs without obtaining their consent.

The Vice-Chancellor held that the step taken by the receiver was not within the powers of a receiver who was not appointed by the Court. No authority had been cited to show that the receiver had such a power, and in the absence of any authority he concluded that he had no such power. He therefore made an order setting aside the writ, but gave leave to appeal.

The plaintiffs appealed.

C. A. 1928 — M. WHEELER & Co. v. WARREN.

Grant K.C. and *John Bennett* for the appellants. Clause 6, sub-clause 1, of the debenture makes the receiver, when appointed, the agent of the company with power to get in the property charged by the debenture; he is therefore entitled to sue in the name of the company for the purpose of getting in assets. If this were not so the receiver would be helpless. The appointment of a receiver still leaves the property charged vested in the company, and if proceedings are necessary in connection with it, they can only be brought in the company's name. If the receiver had to obtain the leave of the company for the use of its name he would be quite impotent. It is well established that a receiver cannot sue in his own name: *In re Sacker* (1); *In re Sartoris's Estate* (2); *D. Owen & Co.* v. *Cronk* (3); see also Kerr on Receivers, 8th ed., p. 238. The action here was a mere incident to carrying out the duties of the receiver.

Further, the Law of Property Act, 1925, s. 109, sub-s. 3, gives the receiver right to sue in the name of the mortgagor in regard to the income of which he is appointed receiver. The effect of clause 6, sub-clause 4, of the debenture is to make this applicable mutatis mutandis, so that it applies not merely to income but to the whole property charged.

Gover K.C. and *J. M. Easton* for the respondent. It is not suggested that the receiver could sue in his own name, and clause 6, sub-clause 4, of the debenture only confers power to sue in respect of income. Further, clause 6 confers no such power in regard to capital, and the question is whether the Court is going to imply such a power. The Legislature, in giving power to appoint a receiver of the income of mortgaged property, gave an express power to sue in the name of the company to recover income. It is doubtful whether there would have been such a power if it had not been expressly provided for: compare *Deyes* v. *Wood*. (4)

[LAWRENCE L.J. referred to the Law of Property Act, 1925, s. 101, sub-s. 3.]

(1) (1888) 22 Q. B. D. 179, 185.
(2) [1892] 1 Ch. 11, 14.
(3) [1895] 1 Q. B. 265.
(4) [1911] 1 K. B. 806, 819.

Sect. 101 is dealing with the powers of a mortgagee and not with the power of a receiver appointed by him. There is nothing improbable about a receiver appointed by the debenture holder having less powers than a receiver appointed by the Court. The Court ought not to imply a power in the receiver to sue in the name of the company.

Again, even if the receiver had power to sue to get in assets, how can he be said to be doing so in bringing an action for rescission of a contract of sale or, alternatively, specific performance? Further, the mere fact that the receiver is the company's agent does not give him the power to sue. In the ordinary case of principal and attorney, the attorney can only sue in the principal's name if he is given express power to do so.

Grant K.C. was not called upon to reply.

LORD HANWORTH M.R. This appeal raises a point on the construction of a debenture given by the plaintiff company. The facts are quite short. We are told that the company was formed for the purpose of building and selling houses with a very small capital and two directors. We are not concerned with the position of the company, except that on September 16, 1927, the company issued a debenture. Circumstances then arose which justified the debenture holder's appointing a receiver, and he did so on November 18, 1927. There had been a contract entered into between the company and the defendant for the sale to her of a house in course of erection, but some difficulties arose in carrying out the contract with which again we are not concerned. On May 5, 1928, the writ in this action was issued by the receiver in the name of the company against her, and the relief asked for was rescission of the contract and forfeiture of the deposit, or alternatively specific performance. An objection was taken and a motion launched by the defendant seeking to set aside the writ on the ground that the receiver had no power to commence the action in the name of the company.

Attention has therefore to be directed to the actual terms of the debenture, and it is of very little purpose to look at

C. A. 1928

M. WHEELER & CO. v. WARREN.

Lord Hanworth M.R.

other debentures to see what powers are given by them. [His Lordship then stated the material parts of the debenture and continued:] Having regard to the terms of the Law of Property Act, 1925, s. 109, it is quite clear that, so far as the income of which he is appointed receiver is concerned, the receiver would have power to bring an action in the name of the company, for a receiver is given power by sub-s. 3 "to demand and recover all the income of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee. . . . ." Clause 6, sub-clause 4, of the debenture makes it abundantly plain that the company's name could be used in proceedings within s. 109, sub-s. 3. Mr. Grant was prepared to advance an argument based on that sub-section, and on s. 101, sub-s. 3, that the power of the receiver was not limited by clause 6, sub-clause 4, to proceedings in regard to income; but it appears to us that it is unnecessary to go into this, as there is, in our view, power under clause 6, sub-clause 1, to bring the action.

It is not expressly stated in clause 6, sub-clause 1, that the receiver is to have power to use the company's name for the purpose of bringing proceedings, but it *is* provided that the receiver "shall be the agent of the company and shall have power . . . . to take possession of and get in the property hereby charged." I think that as the getting in of the property charged is to be done by the receiver and the property is vested in the company, he must have power to get in the property in the only way possible—namely, by bringing an action in the name of the company. The fact that he was made the agent of the company and given the power to get in the property charged is, in my opinion, sufficient to give him power to take the only effective steps in the name of the company. If it does not confer this power, and the receiver has to go to the company for an assent to bringing any action to get in assets, there is no real value in sub-clause 1 of clause 6 and the lender's security is very much reduced. The purport of the debenture was to give ample security to the lender, and, taking this into account,

I come to the conclusion that the words of sub-clause 1 must be taken to confer power on the receiver to bring actions as the agent of the company, and so to get in by action in the company's name the property of the company.

A point was made by Mr. Easton that to make a claim for rescission of a contract is not to get in property of the company; but by the writ in this action the claim is for rescission or specific performance, and if the Court came to the conclusion that the proper relief was specific performance, the action would have the effect of getting in property of the company—namely, the purchase money. The alternative claim for rescission is generally added as a lawyer's mode of getting all questions of substance decided between the parties; and in that sense the proceedings are brought to get in property charged.

For this short reason and on the construction of the terms of the particular document I come to the conclusion that this action was properly brought, and that this appeal must be allowed.

LAWRENCE L.J. I agree. With the greatest respect for the opinion of the learned Vice-Chancellor, I am unable to agree that the name of the plaintiffs ought to be struck out on the ground that the action was commenced without their consent. The action was brought in the name of the plaintiffs by the receiver appointed under a debenture which conferred express power (amongst other things) to get in the property charged. That power, in my judgment, implies a power to do all things necessary or proper for the purpose of getting in the property, and in particular a power for the purpose of collecting debts and other moneys of the plaintiffs in the hands of third parties to take all proper legal proceedings in their name. It is true that in many debentures there is found express authority to bring proceedings in the company's name, but in my judgment there is no real necessity for the insertion of such a provision, which in a case like the present is clearly implied. If no such authority were implied, the power conferred on the receiver for the greater security of

C. A. 1928

M. WHEELER & CO. v. WARREN.

the debenture holder of getting in the property of the plaintiffs would be illusory. I agree, therefore, that the appeal should be allowed.

RUSSELL L.J. I agree. The question really is, what was the contract in this case between the company and the lender? The contract by clause 6 provides that the receiver is to be the company's agent, and further that the receiver is to have power to get in the property charged. That involves his being able to sue in the name of the company. It is argued, however, that in the absence of an express power to sue in the name of the company, the receiver must obtain the company's leave. If that were right, then that which is admittedly inserted in the debenture for the benefit, security, and protection of the mortgagee would confer none, because in every case the receiver would have to go hat in hand to the company for leave to do what on the true construction of the clause I think he has power to do.

Appeal allowed.

Solicitors: *Milner & Bickford, for J. Arnold Haughton & Co., Manchester; Field, Roscoe & Co., for Farrer-Morgan & Co., Manchester.*

H. C. G.

JOHNSON *v.* CLARKE.

MAUGHAM J.

[1927. J. 2402.]

1928

June 28, 29.

Vendor and Purchaser—Contract for Sale of real Estate—Described as Subject to Tenancy from Year to Year—Written Agreement with Tenant subsequently disclosed—Option to take Premises "on any lease suitable to you at the same rent"—Undertaking not to advance Rent—Power of personal Representatives to grant Option—Construction of Agreement—Specific Performance.

A testator, who died in 1911, by his will devised his real estate to his executors and trustees upon trust for sale, with the usual powers of postponement, and power to devise any unsold property either from year to year and for any term at such rent and subject to such covenants as the trustees should think fit. In 1927 the trustees contracted to sell part of the property known as S. Grange, consisting of a freehold house and four acres of land adjoining. The premises had been for some years in the occupation of R., who was described in the contract as a tenant from year to year, but no written agreement of tenancy was disclosed in the abstract of title. Before completion R. produced a letter addressed to him in 1915 and signed by one of the vendors, for himself and his co-executors, purporting to give R. an indefinite option of purchase, and alternatively an option to take a lease of the property for any term suitable to R., and an undertaking that so long as R. remained sole tenant the rent agreed on should not be increased. The purchaser refused to complete on the ground that the agreement of 1915 gave R. a tenancy of S. Grange for his life at a fixed rent, and the vendor sued for specific performance :—

Held, that on the true construction of the agreement R. was merely a tenant from year to year, and any greater right claimed by him, such as an option to take a lease for an indefinite period at the same rent, was beyond the powers of the vendors, as personal representatives, to grant. The agreement was therefore no defence to an action of specific performance.

The Court is bound to decide questions of law, involving the construction of a document of doubtful meaning, as between vendor and purchaser, even though the decision may not bind a third party interested. It will not refuse to do so on the ground of any former rule that the title is too doubtful to force upon a purchaser.

Smith v. *Colbourne* [1914] 2 Ch. 533 and *Oceanic Steam Navigation Co.* v. *Sutherberry* (1880) 16 Ch. D. 236 applied.

WITNESS ACTION.

The plaintiffs, as surviving executors and trustees of the will dated April 6, 1906, of William Hurry Johnson, who died on May 19, 1911, claimed specific performance of an agreement dated March 24, 1927, and made between the

MAUGHAM J. 1928 JOHNSON v. CLARKE.

plaintiffs and one Thomas Pheasant, their co-executor (who died on April 20, 1927), of the one part and the defendant of the other part, whereby the defendant agreed to purchase for 2125*l.* certain freehold hereditaments at Hall End, West Bromwich, being cottages numbered 101 to 123 Hall End (odd numbers inclusive) and a dwelling-house, Sandwell Grange, with land adjoining and eleven cottages erected thereon, the whole amounting to 4a. 3r. 24p. or thereabouts in fee simple in possession. The defendant paid 212*l.* 10*s.* as a deposit, and the completion of the purchase was fixed for April 25, 1927. The sale was subject to the National Conditions of Sale of 1925. Sandwell Grange was stated in the particulars as being in the occupation of A. E. Richards as a yearly tenant.

The defendant refused to complete the purchase on the ground that, as he had since discovered, Richards claimed, under an agreement made between the plaintiffs and himself in 1915, to be entitled to an option of purchase over the property, and for an option for a lease for an indefinite period at the same rent as he was then paying. The document under which Richards claimed was produced by him to the defendant in June, 1927, and was in the following terms :—

" To Mr. A. E. Richards.

Dear Sir,

We understand from our agent, Mr. R. C. Callaghan, that you wish to become tenant of Sandwell Grange, 149 Vicarage Road, West Bromwich, at the rent advertised, and agree to pay the rent quarterly in advance, becoming tenant from the 25th of June, 1925. Sir, in consideration that you have paid the first quarter's rent, we have accepted you as tenant from the 25th day of June, 1915, the 10*l.* being the rent due from 25th June to 29th September, /15, and have given instructions to the decorators to put the house into proper repair at once, and we give to you the option of entering into immediate occupation and we agree not to advance the agreed rent or take part in any action of advancing the said rent, so long as you, the said A. E. Richards, remain sole tenant and regularly pay the rent as agreed.

We also give to you the option of taking the said house and premises on any lease suitable to you at the same rent, or the option of purchasing the said house and premises with or without the cottages pointed out to you at a price to be mutually agreed upon. You can rest assured that if you remain tenant twenty years we shall not interfere with the rent, although we are sacrificing 20*l.* a year.

L. JOHNSON,
for self and co-executors."

The plaintiffs in reply pleaded that the defendant had accepted the title, and that Johnson had no authority, as personal representative of the testator, to grant such an option as was claimed by Richards.

Gover K.C. and *Norman Daynes* for the plaintiffs. At the date of the contract the plaintiffs only had notice that Richards was a parol tenant from year to year. The plaintiff Johnson had no authority as executor of the testator's will to grant such a tenancy as that now claimed by Richards, and set up by the defendant as an incumbrance. But whether or not he had such authority nothing in the agreement is enforceable specifically against the plaintiffs or the purchaser, except the yearly tenancy and the condition that the rent should not be increased so long as Richards remained in occupation. The so-called option of purchase is bad as a perpetuity and for other reasons; it is not an option at all. The Court will not specifically enforce an agreement which amounts, as this does, to a breach of trust: *Kusel* v. *Watson* (1); *Zimbler* v. *Abrahams.* (2)

Under the Law of Property Act, 1925, s. 28, trustees for sale, which by s. 33 and the definition contained in s. 205, sub-s. 1 (xxix.), includes personal representatives holding land on trust for sale, have the same powers in relation to land as a tenant for life under the Settled Land Act, 1925, and those powers, as regards the granting of options to purchase or take a lease, are limited by s. 51 of the Settled Land Act,

(1) (1879) 11 Ch. D. 129. (2) [1903] 1 K. B. 577.

MAUGHAM J.
1928
JOHNSON v. CLARKE.

1925. The price or rent must be fixed at the time of the granting of the option, and the option must be exercisable within an agreed period, not exceeding ten years.

At one time the Courts were not ready to enforce contracts which might involve litigation with a third party, but for many years the tendency has been in the opposite direction. It is the duty of the Court to decide such a point as the present as between vendor and purchaser, even though the third party may not be bound by the decision: *Smith* v. *Colbourne*. (1)

Jenkins K.C. and *J. S. Pritchett* for the defendant. The conduct of the vendors in not disclosing the document of March 20, 1915, disentitles them to equitable relief. The plaintiff Johnson could have supplied the information which led to the discovery of the letter of 1915.

[MAUGHAM J. The defendant received the letter on July 20, and the writ was not issued before September 15.]

The letter does not create an option, but it is an agreement with Richards that he may remain on during his life as a tenant from year to year at a rent of 40*l*. On the faith of that agreement Richards has spent large sums on the property. Richards could remain in possession without increase of rent as long as he wished, but could determine the agreement by notice as if he were a tenant from year to year.

The vendor is under an obligation to the purchaser to disclose all he knows, or all he ought to have known. If a vendor's title depends on a question of construction of a document presenting difficulty, the proper mode of determining that question is by originating summons, otherwise the Court can declare the title too doubtful to force upon a purchaser: *In re Nichols and Von Joel's Contract* (2); Fry on Specific Performance, 6th ed., p. 411, where there is a note referring to the observations of the same judge in *Smith* v. *Colbourne*. (1)

The Court should not decide the effect of this agreement with Richards as between vendor and purchaser. In proper proceedings Richards might prove that both vendors entered into the contract with him. The plaintiffs have ratified the

(1) [1914] 2 Ch. 533, 541. (2) [1910] 1 Ch. 43.

contract made by Johnson by receiving rent from Richards for many years past.

Gover K.C. in reply referred to Fry on Specific Performance, para. 407, 6th ed., p. 194, and *Harnett* v. *Yielding*. (1)

MAUGHAM J. This is an action for specific performance of an agreement dated March 24, 1927, made between the plaintiffs, who at the time of the writ consisted of three gentlemen, Mr. Leopold Johnson, Mr. Frank Charles, Mr. Thomas Pheasant (who has died since action), the executors of William Hurry Johnson, and Mr. C. William Clarke, the defendant in this action, whereby the plaintiffs agreed to sell and the defendant agreed to purchase for the sum of 2125*l.* certain freehold property situate at Hall End, West Bromwich, in the county of Stafford, with certain houses erected thereon. The property in question includes a house known as "Sandwell Grange," and a field at the rear of it containing some four acres. The defendant was well aware that the said house and field had been let to one A. E. Richards upon, as, in my opinion, he thought, a yearly tenancy.

The defence to the action arises with reference to that piece of property and that letting. It is that Mr. Richards in fact is entitled to something far more than an annual tenancy by reason of a letter dated March 20, 1915, addressed to him by one of the plaintiffs, Leopold Johnson, and purporting to be signed for himself and his co-executors. I should add that the title of the plaintiffs is derived from the will of William Hurry Johnson, who died on May 19, 1911, seised in fee simple of the land the subject of the agreement for sale.

Para. 3 of the testator's will is as follows: "I devise and bequeath all my real and personal estate not hereby otherwise disposed of unto my Trustees upon trust that my Trustees shall sell call in and convert into money the same or such part thereof as shall not consist of money and shall out of the moneys produced by such sale calling in and conversion

(1) (1805) 2 Sch. & Lef. 549, 553.

MAUGHAM J. 1928 JOHNSON v. CLARKE.

and out of my ready money pay my funeral and testamentary expenses and debts and the legacies bequeathed by my Will or any Codicil hereto and shall invest the residue of the said moneys with power from time to time to vary the investments And shall stand possessed of the residue of the said moneys and the investments for the time being representing the same (hereinafter called 'the residuary trust fund') upon trust to pay the income thereof to my wife for her life and after her death In trust for all my children in equal shares and if there shall be only one child the whole to be in trust for that child Provided always that if any child of mine shall die in my lifetime leaving a child or children living at my death who being a son or sons attain the age of twenty one or being a daughter or daughters attain that age or marry under that age then and in every such case the last mentioned child or children shall take (and if more than one equally between them) the share which his her or their parent would have taken in the residuary trust fund if such parent had survived me Provided that if any of my said children shall die in the lifetime of my said wife without leaving issue who shall take a vested interest under this clause then the share of my residuary estate which would have been taken by such child if he or she had survived my said wife shall as from the time of the death of such child go and accrue to the other or others of my said children or grandchildren to whom my residuary estate is hereby given in the same shares and proportions in which my residuary estate is hereinbefore made divisible amongst them and be added to their his or her original shares or share in such proportions and shall not form part of the estate of my child so dying as aforesaid."

Then para. 4 states: "I declare that my Trustees may postpone the sale and conversion of any part of my property (including leaseholds or other property of a terminable or wearing out nature) for so long as they shall think fit and that they shall not sell or convert into money reversionary property before it falls into possession unless in their opinion it shall be necessary to do so to prevent loss And I direct

that the rents profits and income to accrue after my death from such part of my estate as shall for the time being remain unsold and unconverted shall after payment thereout of mortgage interest and all incidental expenses and outgoings and howsoever invested be paid and applied to the person or persons and in manner to whom and in which the income of the proceeds of such sale and conversion would for the time being be payable or applicable under my will if such sale and conversion had been actually made."

Then in para. 5 he proceeds as follows: "I declare that as regards my real or leasehold property remaining unsold my Trustees may let or demise the same either from year to year or for any term of years at such rent and subject to such covenants and conditions as they shall think fit and may accept surrenders of leases and tenancies expend money in repairs and improvements and generally manage the property according to their absolute discretion And I direct that any money required for repairs or improvements may be raised either out of income or out of the capital of my estate as my Trustees shall under the circumstances think fair and equitable."

Para. 6 of the will states: "I authorise my Trustees on the decease of my said wife with the consent in writing of all my children then living to appropriate any part of my estate whether real or personal hereinbefore devised and bequeathed to my Trustees in trust for conversion in its then actual condition or state of investment in or towards satisfaction of any share in the said trust premises with power for that purpose conclusively to determine the value of the said trust premises or any part or parts thereof in such manner as they shall think fit."

The letter to which I have referred, dated March 20, 1915, is in these terms. [His Lordship read the letter set out above and proceeded:] The letter is signed "L. Johnson, for self and co-executors." The contract is a contract substantially in common form; it incorporates what I think are known as the "National conditions of sale" as the general conditions. It provides for an abstract in the usual way, and nothing is

MAUGHAM J. 1928 JOHNSON v. CLARKE.

said in the contract at all about the tenancy of this house and the field behind it. In the abstract of title there was no disclosure of this document, which was quite unknown no doubt to the solicitors acting for the vendor. The purchaser, as I have said, knew that there was a tenant of the house and piece of land.

In addition to other objections to title, with which I need not deal, because they were ultimately withdrawn, the purchaser objected on the footing that Richards asserted that he had correspondence signed by Mr. Johnson which involved his having a much greater right, as I have said, than that of a yearly tenant. It was not, however, until some time in June, 1927, that Mr. Richards definitely asserted to the solicitors for the purchaser that he had a written agreement, and it was not, I think, until early in July that the defendant, or his solicitors, read a copy of this document, and raised the point that upon the document the letter created either a life tenancy or something extremely like it.

I should mention before going further that the document is signed only by the plaintiff Johnson. It purports to be signed for self and co-executors; but it appears from the evidence to which I have to refer later that Johnson signed it without any communication with his co-executors or co-trustees. It is, of course, a very important document, and the clause at the end of it points very clearly to the fact that Mr. Johnson was not fully acquainted with the duties of trustees. However, the question arises in this action whether the defendant can successfully defend the claim for specific performance on the ground that that document, or the rights of Mr. Richards thereunder, constitute an incumbrance on the property which makes the title bad.

Now, I should like to say at the outset for myself that I have a great deal of sympathy with the view that it is hard upon a purchaser that he should be bound on occasion to accept a title which is open to a doubt arising from the circumstance that the decision of the Court in a specific performance action does not technically bind the person who may be thought to have a claim adverse to the title sold,

and accordingly that in fact there is a title being forced upon a purchaser which may involve a law suit. In other words, I agree with what the late Master of the Rolls said in *Osborne to Rowlett.* (1) Sir George Jessel there recognizes, after saying he thinks the old rule is best, that the rule has been changed; and it is the fact that the Court, according to the modern practice, subject to an exception which I will mention, is bound to decide a point of this sort, except in very exceptional circumstances, and to decide whether on the evidence which is produced at the hearing of the action for specific performance the objection to title is good or bad. That appears clearly from the decision in *Smith* v. *Colbourne* (2), which was a decision of the Court of Appeal. In that case Lord Cozens-Hardy M.R. said this: "Lastly, it was urged that the title is too doubtful to be forced upon a purchaser. The Courts have in modern times not listened with favour to such a defence. It is the duty of the Court, unless in very exceptional circumstances, to decide the rights between the vendor and the purchaser, even though a third person not a party to the action will not be bound by the decision." And Swinfen Eady L.J. said this: " . . . . but the rule of the Court is that enunciated by James L.J. when delivering the judgment of the Court of Appeal in *Alexander* v. *Mills.* (3) As a general and almost universal rule, the Court is bound as much between vendor and purchaser, as in every other case, to ascertain and determine as it best may what the law is, and to take that to be the law which it has so ascertained and determined."

Now, I do not think that the previous decision of the Court of Appeal in the case of *In re Nichols and Von Joel's Contract* (4) in any way conflicts with that decision. *In re Nichols* (4) was a case where the title depended upon a question of construction arising under a will involving real difficulty, and what was held was this—that inasmuch as there is according to modern practice a

(1) (1880) 13 Ch. D. 774, 781.
(2) [1914] 2 Ch. 533, 541, 544.
(3) (1870) L. R. 6 Ch. 124, 131.
(4) [1910] 1 Ch. 43.

MAUGHAM J. 1928 JOHNSON v. CLARKE.

very easy mode in which the construction of a will can be determined in such a manner as to bind all the persons interested under that will it is not right in that case for the Court to force a title upon the purchaser which may mean that he is buying a law suit. If then there were in this case some easy method of ascertaining whether Mr. Richards has got the rights which he no doubt claims under the document of March 20, 1915, I am not at all sure that it would not be right for me to refuse the present order and to say that the purchaser should clear his title; but I do not myself see that there is any easy method of determining that question. I think therefore that although there is, as I have said, the exception of a case where an originating summons would clear up the difficulty, to suggest a vendor and purchaser summons, or something of that sort, here, would still leave the Court in the position that the question would have to be determined in the absence of Mr. Richards; and upon the authorities I am unable to hold that the right thing to do is to compel the vendor to commence an action against Mr. Richards to determine in some way whether a document which they say is not binding has any validity or not. Accordingly, unless there is going to emerge from the circumstances that I am going to mention some very great or serious difficulty with regard to the document in question, I think it is the duty of the Court to ascertain as best it can to use, I think, the phrase of James L.J., whether Mr. Richards has any enforceable right against the estate of the testator other than that which arises from his having paid rent for a number of years and being a tenant from year to year. I have to consider that in the light of the evidence before me.

In this case Mr. Johnson and Mr. A. E. Richards have both been called. Mr. Johnson has given evidence that he wrote or, rather, that he signed this letter. It was, he says, prepared by him without any communication with his co-executors. Mr. Richards has given evidence which shows that he did in fact after getting this letter expend substantial sums upon part of the property on the faith of the statements

contained therein. Now, with those two facts before me, what is the proper inference that I should draw as to whether Mr. Richards has got anything beyond an enforceable right to remain as tenant from year to year? Considering that, I have to bear in mind the Land Transfer Act, 1907, which was in force at the date of the testator's death. So far as the rights of Mr. Johnson as a sole executor are concerned, it seems to me clear that he had no right to lease the property at all before the Land Transfer Act as a single executor. Since the Act the right is one which under the provisions of s. 2 can only be exercised jointly with the other executors. Accordingly, as executor this gentleman had no right to grant any lease at all, and I am satisfied that upon the evidence before me I ought not to come to the conclusion that it is anything more in substance than an act by Mr. Johnson alone. Of course the co-trustees have power to lease, and I should be quite willing to infer—I think I am bound to infer—that the co-trustees of Mr. Johnson were informed by him that he had let the property to Mr. Richards at 40*l.* a year, and that they assented; but I do not think I have any right to assume that his co-trustees were made acquainted with this very singular document, and I am not sure that it makes very much difference if they were or not.

Looking at the document, what does it amount to? It is abundantly clear, I think, that the option to purchase is of no importance at all, because it is an option to purchase at a price that is mutually to be agreed upon. It is also, I think, reasonably clear that under the power of leasing contained in the document there was no power for the trustees to sell the property for the life of Mr. Richards. I do not myself think it is possible to contend that either the executors or the trustees could possibly have let the property from year to year to Mr. Richards with an option to him to take the lease for any period of years that he thought fit. That, again, is not exercising the powers which they are given under the will. On the other hand, I think it is true that if Mr. Johnson had been an absolute owner Mr. Richards could well have said that he had entered into a binding obligation

MAUGHAM J. 1928 JOHNSON v. CLARKE.

not to advance the agreed rent or to take part in any action of advancing the said rent so long as he, Richards, remained the sole tenant and regularly paid the rent. I think, therefore, it would have been quite open to Mr. Richards to have resisted any notice being given to him by Mr. Johnson on the hypothesis that I have mentioned so long as the rent was being punctually paid and Mr. Richards remained the sole tenant.

But what I have to consider is this: Would such an agreement made either by one or all of the trustees of such a will as I have here be anything but a breach of trust? I am quite satisfied that in substance the trustees were trustees for sale with the limited power of leasing that I have mentioned, but were not entitled in the performance of their duties to grant rights to Mr. Richards which would have given him the option to remain in possession during the whole of his life if he so desired it, and at the same time gave him liberty to give notice to quit if for any reason the occupation at 40*l.* a year ceased to be beneficial. There are a number of cases on these lines. The best known and most often quoted is that perhaps of the *Oceanic Steam Navigation Co.* v. *Sutherberry* (1), where an administrator granted an under lease with an option of purchase at a future time, and it was held by Sir George Jessel M.R. that though it might be that a great hardship would be inflicted upon the plaintiffs who were claiming under the agreement, the Court was bound to hold that to grant an under lease was an exceptional mode of administering the assets. Sir George Jessel says this (2): "... but the question is not whether this was a proper rent, but whether it was right to insert an option of purchase"—now mark the next words—"so as to fetter the exercise of the trust for sale by preventing the administrator from selling the property to any one but the plaintiffs for a period of seven years at a price then fixed. It appears to me that it would be dangerous to hold that an administrator could do this, a mere trustee whose duty was to sell within a reasonable time"; and James L.J., after saying

(1) 16 Ch. D. 236, 243. (2) 16 Ch. D. 243, 245.

he sees no difference for the purposes of that case between an executor or administrator and any other trustee, adds (1): "In my opinion it would be most dangerous if a trustee could enter into a contract for sale binding the estate for some years afterwards, whatever might be the alteration in the value of the property." Of course they are dealing with cases where it is the tenant who has a right to bind the estate. If the will authorized it there would have been no difficulty in the trustees letting the property for twenty years, provided the tenant is bound. The peculiarity of this agreement, if I correctly understand it, is this: that the tenant is not bound; he can go out on the usual six months' notice; the trustees are quite unable to sell with any hope of giving the purchaser present possession or possession within a reasonable time during the whole of the life of the tenant. Moreover, the result of the agreement, if it has the meaning which I suggest, is that in effect the tenant is a tenant for life with an option to determine the tenancy if he pleases. Such a tenancy is, I think, wholly beyond the powers of the executors or the trustees to grant in the circumstances of this case.

Accordingly, I come to the conclusion that Mr. Richards, on the facts proved in this case, will have no reasonable chance of success in an action against the purchaser with a view to establishing that he has any rights beyond that of an ordinary tenant from year to year; and coming to that conclusion I think I am bound to say that the case is not one of those exceptional cases where the Court ought not to force the title on the purchaser, but is a case which the Court is bound to decide. I have come to the conclusion that the document in question is not one which creates what from this point of view is an incumbrance on the property. I must make the usual decree for specific performance.

There remains, however, the question of costs; and with regard to that I confess I have had some hesitation. No doubt the usual rule is that the Court in compelling specific performance of an agreement which is objected to on some

(1) 16 Ch. D. 243, 245.

MAUGHAM J. 1928 JOHNSON v. CLARKE.

ground that fails is in the habit of making the defendant pay the costs in order that there should not be any doubt left as to whether the objection to title is a good one or a bad one. In this case I have a somewhat singular set of circumstances. Mr. Johnson, who is one of the plaintiffs, of course ought, having written such a letter, to have preserved it in his mind and to have informed his co-trustees of it. They should all, and certainly Mr. Johnson should, have told their solicitor. It should have been disclosed in the abstract, because it is an agreement which purports on the face of it to affect the property, and it should not have been left to the defendant purchaser to discover by a number of inquiries that such a document existed. Moreover, I think it is the truth that the agreement is one of a very singular character. No one has ever seen an agreement exactly like this before, and I think it is the fact that the defendant was not acting unreasonably in submitting to the Court the question whether under such an agreement Mr. Richards has got anything more than the limited right which I have mentioned. On the whole, therefore, having regard to the exceptional nature of the circumstances with regard to the agreement and to the fact that the plaintiffs' conduct in the matter has not been wholly satisfactory, I think I shall be doing justice in the case by granting the usual decree but making no order as to costs.

Solicitors : *S. F. Miller & Miller, for Thursfield, Messiter & Shirlaw, Wednesbury ; Kingsley Wood, Williams & Co., for William Bache & Sons, West Bromwich.*

H. L. L.

In re ETIC, LIMITED.

MAUGHAM J.

[1928. E. 00142.]

1928

June 25 ; *July* 2, 16, 27, 31.

Company—Winding Up—Summons by Liquidator against Secretary—Extent and Limitations of Use of s. 215 *of Companies* (*Consolidation*) *Act*, 1908 (8 *Edw.* 7, *c.* 69).

The liquidators of the company issued a summons under s. 215 of the Companies (Consolidation) Act, 1908, against the secretary of the company asking for a declaration that he was indebted to the company for the expenses of a visit by him to America and for sums overdrawn on account of his salary. The respondent alleged that he had a right of set-off against the sums overdrawn. On the evidence his Lordship found that the claim for expenses was not made out, and on the question whether s. 215 was intended to apply to a claim for sums overdrawn by a secretary with the consent of the managing director :—

Held, that the operation of s. 215 was not applicable to all cases in which a company had a right of action against an officer of the company, but was limited to cases where there had been something in the nature of a breach of duty by an officer of the company as such which had caused pecuniary loss to the company; no order would therefore be made on the summons under the summary jurisdiction under s. 215.

THE following are the facts, as stated by his Lordship in his judgment :—

This is a summons taken out under s. 215 of the Companies (Consolidation) Act, 1908 (1), in the matter of the Companies Acts and in the matter of Etic, Ld., by the joint liquidators appointed in the voluntary winding up of that company. The respondent is Mr. P. M. Ballard, who was the secretary of the company. The summons asks for a declaration that

(1) Sect. 215 : "Where in the course of winding up a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer of the company, has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the official receiver, or of the liquidator, or of any creditor or contributory, examine into the conduct of the promoter, director, manager, liquidator, or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance, or breach of trust, as the Court thinks just."

MAUGHAM J. 1928 ETIC, *In re.*

Mr. P. M. Ballard is indebted to the company in certain sums of money. The summons as amended claims first two sums of 160*l.* 14*s.* and 105*l.* 6*s.* 8*d.*, the expenses of a trip to America by the respondent alleged not to be authorized by the company, and, secondly, the repayment of moneys overdrawn by the respondent on account of his salary, which amounted to 108*l.* 15*s.*

The company was incorporated in the year 1924. I have not been informed as to its capital, and I have not seen its memorandum and articles. Mr. Clements, a witness whose evidence I have to consider later, was at all material times the manager of the company, and from a date in 1926 was managing director of the company. Mr. Pomeroy was at all material times the chairman, and was the sole director until the appointment of Mr. Clements as managing director. The whole of the shares in the company are held by a Dutch company, or a Dutch group, who have been represented throughout the history of the company by a Mr. Van Draat, of Amsterdam, and the director or directors, and the auditor and the secretary have been accustomed to look upon Mr. Van Draat as entitled to express the view or views of the shareholders in the company. Mr. Ballard was appointed secretary on January 13, 1925, at a salary of 600*l.* a year. The company went into voluntary liquidation on September 28, 1927, and the services of Mr. Ballard were at once dispensed with. I may say here that voluntary liquidation is not perhaps per se a dismissal of all servants of the company; the question seems to be still open for the consideration of the Courts. The query is raised in Buckley on Companies, 10th ed., p. 466, and the cases which relate to it are there cited. There has been no evidence as to what took place with regard to the dismissal of the respondent, and for this reason: that one of the liquidators of the company, Mr. Burrell, a chartered accountant, in his first affidavit in support of the summons, para. 14, states this: "The liquidators are advised and verily believe that the said Percy Montague Ballard is entitled to three months' salary in lieu of notice, so that after giving credit for such three months' salary there is due

and owing from the said Percy Montague Ballard to the company the sum of," etc. It thus appears, there having been an admission in the affidavit of the liquidator that Mr. Ballard was entitled to three months' salary in lieu of notice, no evidence has been filed upon it.

I will state shortly the facts as I find them with regard to the two claims made here by the liquidators against the respondent. I will take the journey to America first. The respondent, as I have said, was appointed secretary in September, 1925, at a salary of 600*l.* a year. He worked very hard after his appointment. His health broke down, and in August, 1926, he was advised to take a rest, and he thought of booking a passage to Algiers, and he mentioned this matter to the general manager, Mr. Clements. According to Mr. Ballard it was Mr. Clements who suggested that it should be a visit to America made by Mr. Ballard in order that he might there visit various people with whom the company was in touch and possibly open up a source of business for the company. It appears that Mr. Clements himself bought the ticket to Quebec or to Montreal. According to Mr. Ballard it was generally understood, although I do not think that Mr. Ballard himself said that the matter was very closely or clearly discussed, that the expenses of the trip should be paid by the company. Mr. Ballard left on September 30. The ship sailed on October 1. He arrived at Montreal on October 10. He went to Toronto, where he stayed one day with his brother, and he sent a cable dated the 13th to the company. He then went to Boston, and from Boston to New York, where he arrived on October 15. He spent twenty days in the United States ; he was in the train for seven or eight days ; he visited a number of firms to whom he had introductions. He came back second class by the *Aquitania*, leaving, I think, on October 27. He had no friends or relations whatever in the United States or in Canada except at Toronto. His expenses, as I am going to show in a minute, were paid by the company, and until the company was in liquidation no claim was ever made against him to repay any part of these sums.

MAUGHAM J.
1928
ETIC, *In re.*

Mr. Clements, on the other hand, gives a somewhat different account. He again does not seem to be clear that anything very distinct was settled with regard to the expenses of the trip. He says in para. 9 of his affidavit: "Knowing that the respondent was going to Canada I suggested that he should, if both time and his health permitted of his so doing, visit certain firms and companies in the United States with a view to extending the company's hardwood business, and agreed on behalf of the company to pay any additional expenses he might be put to in the course of visiting such firms and companies." He says in para. 10: "The respondent agreed to my suggestions and I accordingly gave him the letters of introduction mentioned in para. 7 of his affidavit. The sole object of my writing the letter of September 27, 1926, was to enable him to enter the United States from Canada, which otherwise he could not have done."

I have carefully attended to the evidence given by both Mr. Ballard and Mr. Clements upon this matter, and I think that Mr. Clements' recollection is not to be relied upon, and I give credit to the evidence of Mr. Ballard. I would add that I think it is impossible to believe that a man in his position and with his salary would have incurred upon his own account the costs of a visit to America with a desire to spend one day with his brother, which is all the time, upon the evidence, that he did spend. I would add that the documentary evidence seems to me all in favour of the respondent's view with one small exception that I shall mention later. The letters of introduction clearly show that there was intended something in the nature of a business visit by Mr. Ballard, because their usual form begins in this way (they are signed on behalf of the company by Mr. Clements as manager, and this is addressed to some firm in New Orleans or Baltimore or elsewhere): "This is to introduce our secretary, Mr. P. M. Ballard, who is at the present moment on a business visit to your country. As he will explain to you personally, we have extraordinary opportunities for the sale of American hard woods." Then there is a description of their business, and then it ends up: "Trusting that the conversations he will have with you will

lead to business which shall be ultimately to our mutual satisfaction." Then there was an application for a visa, and that was signed by Mr. Clements as manager on behalf of the company, and dated September 27, 1926. It is addressed to the American Consulate, and is in these terms: "With reference to the application of our secretary, Mr. P. M. Ballard, for a visa to enter the United States, we beg to inform you that his visit there is in connection with our business as hardwood importers and that we anticipate the duration of his visit there will be about two weeks. He proposes to enter the United States from Canada." I have the cables which Mr. Ballard sent for expenses, which it seems to me very strange that he should send unless he thought that he was entitled to these moneys from the company. The first cable is dated October 13. I am not sure whether that is the date of the sending or receipt. It is addressed to Mr. Clements: "Arriving New York Friday cable fifty pounds to Ballard Equitable Trust Company." Then there is another cable on October 23: "No answer my cable 40 my address Hotel Jung New Orleans." That was a request for 40*l.* Then there is another cable which I need not read. These sums were advanced in due course, the company paid for his ticket before he left, and other expenses were advanced to him while there, or repaid to him; and it is the fact that all these sums were entered in due course in the petty cash book of the company, and that there are what are called receipts in Miss Bailey's handwriting, Miss Bailey being one of the clerks employed by the company, for the two amounts of 105*l.* 6*s.* 8*d.* and 160*l.* 14*s.*, expenses for the month, and one of them is called "American trip."

Against this there is merely this fact, that before the respondent left, namely, on September 27, 1926, there is a minute of a board meeting, not drawn up by Mr. Ballard, which contains these words: "It was resolved that during the absence of the secretary, Mr. Percy Montague Ballard, on holiday, Miss Gladys Bailey"—the lady whose name I have mentioned—"should be authorised to sign cheques for secretary." I think that that minute throws very little

MAUGHAM J. 1928 ETIC, *In re.*

light upon the matter. The respondent did not visit America in his capacity as secretary. He was absent as secretary on a holiday, but he was performing special duties which were committed to him, by the admission of Mr. Clements, and I do not think that that minute really throws light upon the question whether he was entitled to be paid his expenses of the trip by the company or not.

On the whole, I come to the conclusion that this claim on behalf of the liquidator is not made out, and I think that the respondent was induced to go to America in the belief and on the understanding that, speaking generally, the expenses of the visit would be paid by the company, and, on the evidence, it seems to me that there is no clear statement with regard to the additional expenses which might be incurred by reason of Mr. Ballard's visit to Canada. On the other hand, I have considerable doubts whether it was within the authority of Mr. Clements to authorize the incurring of any additional expenses by reason of the visit to Canada instead of a direct visit to the United States. It took some days, as the facts which I have stated show, before the respondent reached New York, where he could begin to act on behalf of the company. The point has not been fully argued, there, of course, being no pleadings of any kind in this case. The memorandum and articles have not been produced; no specific evidence has been given with regard to the authority of Mr. Clements, and I shall express no opinion as to whether Mr. Ballard is not bound on the proper proceeding to pay the additional expenses of the trip due to the fact that he visited his brother in Canada; but I am unable to make an order on this summons for the sums of 160*l.* 14*s.* and 105*l.* 6*s.* 8*d.*, which are claimed as repayable by Mr. Ballard, because I am satisfied that he is not bound to repay them.

Now I come to the payments in advance, by which I mean the payments which are described in the summons as "money overdrawn by the said P. M. Ballard on account of salary." Upon this part of the case there seems to be no dispute of fact at all. Mr. Clements in his affidavit, para. 19, says this: "With regard to para. 18 of such affidavit, it is perfectly

true that I verbally instructed the respondent "—that is Mr. Ballard—" to overdraw his salary in contemplation of a proposed increase of salary, but no amount "—that is to say no amount of the increase—" was ever fixed, nor was there any authority for such overdrawing except the verbal understanding that I had with Mr. Van Draat"—who, as I have said, represented all the shareholders of the company—" that pending an adjustment of the salaries of the respondent and myself, both the respondent and myself should temporarily overdraw our salaries, which at that date, namely, September, 1926, were 600*l.* and 1000*l.* per annum respectively." That statement is very similar to a statement that Mr. Clements had already made in a letter of February 20, 1928, in answer to, I think, an inquiry made by the liquidators. The letter contains this paragraph: " In reply to your letter of the 10th inst., I beg to give you the following particulars. Mr. Ballard's account was overdrawn with my knowledge after I had discussed the matter with the representative of the Dutch company who owned the whole share capital. The overdrawing was not formally authorised at any Board meeting." That was in answer to the letter from Thomas McLintock & Co. on behalf of the liquidators.

J. G. Strangman for the applicants, the liquidators. No set-off is allowed upon a proceeding under s. 215 of the Companies (Consolidation) Act, 1908: see Palmer's Company Precedents, Part II., p. 698 (11th ed., p. 706), and *Flitcroft's Case* (1) and *Ex parte Pelly*. (2) There is no case which throws doubt on that proposition. If there were accounts between the company and the respondent, and there were moneys the respondent had to bring into the account, they would come within s. 215: see *Flitcroft's Case*. (1) Under a summons issued under s. 215 the respondent is liable to the company whether there has been misfeasance or not, as that section includes the case of any officer having become liable or accountable for any money or property of the company, and the words " compel him to repay " in that

(1) (1882) 21 Ch. D. 519, 535. (2) (1882) 21 Ch. D. 492.

MAUGHAM J.
1928
ETIC, *In re.*

section include any sum owing by him to the company for which he is liable or accountable. Therefore these proceedings are permissible under s. 215.

H. H. Hanworth for the respondent. This summons under the summary jurisdiction conferred by s. 215 is misconceived: the language of s. 215 indicates clearly that it was intended to apply only in cases of actual wrongdoing, and here the respondent denies that he owes the money to the company, and it is only a case for an action to be brought in which he would have the opportunity to prove that the company have wrongly claimed these moneys. The company by bringing proceedings under this section assume the respondent has been guilty of misfeasance. The section differs in no way from s. 165 of the Companies Act, 1862, except as to remedy, and the cases decided on that s. 165 have always limited the operation of the section to real misfeasance or breach of trust: *Coventry and Dixon's Case.* (1) If the company could bring no action against the respondent before the liquidation, no action lies by the liquidators under s. 215. The liquidators are proceeding solely on an alleged wrongful act of the respondent. The extent to which s. 165 could be used is indicated by Lindley L.J. in *In re Kingston Cotton Mill Co.* (*No.* 2) (2), where he says that the object of the section was to facilitate the recovery by the liquidator of assets of a company improperly dealt with by any of its officers, and that it applied to breaches of trust and to misfeasances by such persons, but not to all cases in which actions will lie by the company for the recovery of damages; and he continued that it was easy to imagine cases of contract, negligences or other wrongs to which the section was inapplicable. That meets this case, and shows that here, where no possible wrongdoing has taken place but where there is only a dispute as to whether on certain facts any money is due to the company by the respondent, an action by the company is the remedy and that they have no right to proceed under s. 215. There would be injustice if the respondent had no right of set-off. If there was any negligence, it was negligence of the company,

(1) (1880) 14 Ch. D. 660. (2) [1896] 2 Ch. 279, 283.

not of the respondent: *Stringer's Case.* (1) There is no evidence of fraud. The section gives no new rights, but provides a summary mode of enforcing existing rights. The Irish Courts took the same view of the extent of the section: see *In re Irish Provident Assurance Co.* (2)

[He referred to Buckley on the Companies Acts.]

Strangman in reply. Moneys overdrawn are moneys misapplied. Sect. 215 is in two parts, that dealing with misfeasance and the part that is governed by the words "become liable or accountable." All the cases cited for the respondent deal with the word "misfeasance," whereas the whole section is framed in the alternative. In *In re Innes & Co.* (3) no objection was taken by the Court to proceedings by summons in a winding up such as this against the three directors of the company to render them liable as contributories.

[He referred to *Archer's Case* (4) and *In re A Debtor.* (5)]

There is no case dealing directly with the point to be decided, and I rely therefore on the comprehensiveness of the wording of the section itself.

Cur. adv. vult.

July 31. MAUGHAM J. The summons has had a very unfortunate history. It was taken out in the first instance as a summons not apparently under s. 215 of the Companies (Consolidation) Act, 1908, for, what I may call for brevity, misfeasance, but rather as a summons under s. 193 of the Act, under which, where a company is being wound up voluntarily, the liquidator or any contributor can apply to the Court to determine any question arising in the winding up. As originally taken out the summons asked for a declaration that the respondent was indebted to the company in the sum of 119*l.* 9*s.*, alleged to be due and owing by him to the company, and made up as follows: and then, reading it shortly, a sum of 160*l.* 14*s.* moneys drawn by Mr. Ballard as expenses of a trip to

(1) (1869) L. R. 4 Ch. 475.
(2) [1913] 1 I. R. 352, 369, 372–3.
(3) [1903] 2 Ch. 254.
(4) [1892] 1 Ch. 322.
(5) [1927] 1 Ch. 410.

MAUGHAM J.
1928
ETIC, *In re.*

America not authorized by the company; and 108*l.* 15*s.* moneys overdrawn by Mr. Ballard on account of salary, which made a total of 269*l.* Then beneath that were the words: "Less three months' salary in lieu of notice, 150*l.*" That left a balance of 119*l.* 9*s.* which was claimed as due to the liquidators. Evidence was filed in due course on that summons on behalf of the applicants and the respondent, and notices were given that each side desired to cross-examine the deponents of the hostile affidavits. When it came before me in that state of things, counsel for the applicants asked for leave to amend so as to exclude all reference to the admitted set-off, as it appeared in the summons. It is settled law that no set-off is permissible to an officer of a company on an application under s. 215. That was decided first, I think, in the case of *Ex parte Pelly*. (1) It was not clear to me, as I have already said, that the summons as originally framed was intended to be a misfeasance summons at all; in fact, as drafted, I think it was a summons under s. 193. It is, of course, known to all of us that rights and liabilities even of creditors or debtors are frequently determined on summonses in the voluntary winding up, with the consent of all parties, even though the party other than the company might be entitled in strictness to insist upon an action being brought. I thought it right to warn counsel for the liquidators that if he amended so as to bring the application strictly under s. 215, the result might be that I should hold that the case was not one where relief could be given under the section. The amendment was not, I think, opposed by counsel for the respondent, who naturally was reserving his right to contend that there was no jurisdiction under s. 215, and ultimately the amendment was made. In the circumstances, no point has been argued before me on the question of the right, or possible right, of set-off or cross-claim of the respondent in respect of damages for wrongful dismissal, which, as I have said, was in effect admitted by the original summons, in the form of an admission that three months' salary in lieu of notice could be deducted from

(1) 21 Ch. D. 492.

the liquidators' claim, and I express no opinion whatever about this matter.

Dealing with the summons as amended it will be observed that it deals with two quite separate matters: first, a claim to two sums of 160*l.* 14*s.* and 105*l.* 6*s.* 8*d.*, the expenses of a trip to America by the respondent, alleged not to be authorized by the company, and, secondly, a claim for the repayment of moneys overdrawn by the respondent on account of his salary, which amounted to 108*l.* 15*s.*

Before proceeding to state the facts as proved in this case on those two heads, I think I ought to state my opinion as to the true construction of s. 215 of the Act of 1908, and to decide whether in the circumstances of this case there should be made an order under that section. It is no doubt true that of recent years there has been a tendency to give the language of that section a wider interpretation than the Courts were originally willing to give it. On the other hand, it is to my mind obvious that that section does not apply in every case in which a company in liquidation has or had a right of action against an officer of a company. If there were a right to summary relief in every such case s. 215 would have been very much more simple in its form. The language used would have been quite different, and in particular the phrases "Guilty of any misfeasance or breach of trust" and "examine into the conduct of the promoter, director, manager, liquidator, or officer" would not have been used, and the phrase "compel him to repay or restore the money or property or any part thereof, with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance, or breach of trust, as the Court thinks just" would not have been used. It would have been quite sufficient to say that if in the course of the winding up of a company it appeared that there was a right of action against any officer of the company that might be determined in a summary manner. It has long ago been decided that the section has not got that wider application, and it may be useful that I should summarize

MAUGHAM J.

1928

ETIC, *In re.*

some of the cases in which, I think, the Courts have clearly held that the section is limited.

The first case which I shall cite is one decided in 1880: *Coventry and Dixon's Case.* (1) It was the case in which it was held that s. 165 (which was the old form of s. 215, with a slight alteration of form which is wholly immaterial to any question which I have to determine) creates no new right, but merely provides a summary mode of calling officers to account for acts of impropriety for which they are liable in an action. In the Court of Appeal James L.J. says: "I am of opinion also that the word 'misfeasance' in that section means misfeasance in the nature of a breach of trust, that is to say, it refers to something which the officer of such company has done wrongly by misapplying or retaining in his own hands any moneys of the company, or by which the company's property has been wasted, or the company's credit improperly pledged." Bramwell L.J., after referring to the various phrases to which I have referred as appearing in the section, says: "Is it possible to hold that a man doing nothing wrong in itself, except that he acts without being qualified to do so, is within the meaning of those words? I have the strongest opinion that it is not. If he has done anything wrong as a de facto director, no doubt he can be got at under the clause."

In the year 1882 the question arose in a case of *In re Wedgwood Coal and Iron Co.* (2) before Fry J. Fry J., after referring to the words of the section on which I have insisted, says: "There is, however, a difference which the law recognises, between 'misfeasance' and 'non-feasance'; in other words, between sins of commission and sins of omission, and I think therefore that the Legislature plainly did not refer to cases of mere non-feasance except, of course, where there has in fact been a breach of trust. There was no intention of giving this power of summary proceedings in such a case. In my view, that is the plain construction of the Act." I believe that the language of Fry J. (as he then was) in making a sort of distinction between misfeasance

(1) 14 Ch. D. 660, 670, 673. (2) (1882) 47 L. T. 612, 613.

and non-feasance has been criticized, but I do not find that the substance of his judgment has been adversely criticized at all; in other words, I think that the decision is that the section applies only to cases where there has been in some true sense a misapplication or retention of moneys or property of the company or a positive misfeasance or breach of trust. I am satisfied that on the true construction of the section and upon the authorities, if, for instance, a director of a company happened to carry on, we will say, a business of some kind and became indebted to the company for a breach of contract entered into by him not as a director at all but in his capacity of an independent person, no summary proceeding under s. 215 would be in the least applicable to such a case. The company, as in nearly every case in an ordinary simple contract debt, or an ordinary claim of the company for unliquidated damages, would be left to bring the action in the ordinary way, in which action the defendant officer would be entitled to any set-off or counterclaim which was open to him, and would be entitled to security for costs to be given by the company.

The next case to which I want to refer very shortly is *Ex parte Pelly* (1), which I have already mentioned, because, as it seems to me, the fact that under s. 215 there is no right of set-off is itself an indication that the Courts have considered that the jurisdiction under s. 215 is a special one and is confined to claims by the company against the officer in which it would not be right for the officer of the company to be entitled to set up a right of set-off. The language of Sir George Jessel in dealing with the matter in his decision in *Ex parte Pelly* (1) strongly tends to show that in his view s. 215 really only applies where there has been some wrongful act by the director, manager, liquidator, or other officer of the company, either of the nature of misfeasance, or of the nature of breach of trust in a wide sense, including no doubt a breach of trust by negligence, or something of that kind.

I now come to the case of *Cavendish Bentinck* v. *Fenn*. (2) In that case Lord Herschell, after referring to the section,

(1) 21 Ch. D. 492. (2) (1887) 12 App. Cas. 652, 661, 669.

MAUGHAM J. 1928 ETIC, *In re.*

says: "But when an applicant seeks under the 165th section to establish a case of misfeasance"—I think he is using there the word "misfeasance" as meaning all the various things mentioned in s. 165—"I think it is necessary for him to give evidence of all the elements that go to make up that misfeasance." Lord Macnaghten says: "The 165th section of the Act of 1862 has often come under discussion, and it has been settled, and I think rightly settled, that that section creates no new offence, and that it gives no new rights, but only provides a summary and efficient remedy in respect of rights which apart from that section might have been vindicated either at law or in equity. It has also been settled that the misfeasance spoken of in that section is not misfeasance in the abstract, but misfeasance in the nature of a breach of trust resulting in a loss to the company. Apparently it has not been judicially determined that the applicant is bound to show that he is interested in the result of the application, but I think it must be so. I cannot think that Parliament intended that a person who happens to come under the description of a creditor or a contributory may take upon himself the functions of a public prosecutor in a matter with which he has really no concern. It was therefore, in my opinion, necessary for the appellant to prove that Mr. Fenn has committed a breach of trust, or a misfeasance in the nature of a breach of trust, as a director of the Cape Breton company, and that by reason of that misfeasance the company has sustained loss; and it was also necessary for him to show that he has an interest in the result of the application." That language I think would be quite wrong and misleading if the truth were that in any case in which the company has a claim to recover damages from an officer of the company the section is applicable. If the section were without limit it would be quite unnecessary to discuss so carefully the meaning of the word "misfeasance" or the reference to breach of trust. It is true that when a director has been guilty of fraud the Courts have been quite willing to treat such a case as one in which the director must be regarded as liable or accountable for money or property of the company. Such a case is *Archer's Case*. (1) The decision

(1) [1892] 1 Ch. 322, 339.

of Kekewich J. on the section appears to have been reversed, and Lindley L.J. says with regard to the section, and after referring to the speech of Lord Herschell in *Cavendish Bentinck* v. *Fenn* (1) : " The present case proceeds upon the ground that Mr. Archer has, in fact, received money to which the company is entitled, and the observation, therefore, that there has been no loss by the company, or that the liquidator, creditor, or contributory cannot take out a summons under s. 165 unless he shows that the breach of duty has resulted in loss to the assets of the company, and that he has a direct pecuniary interest in the success of the application, is inapplicable to this case." And, a little later : " But if you once arrive at the conclusion that the person proceeded against has received money to which the company is entitled and does not pay it over, the observations of Lord Herschell have no real bearing on the present case."

The conclusion at which I have arrived is that s. 215 is not applicable to all cases in which the company has a right of action against an officer of the company. It is limited to cases where there has been something in the nature of a breach of duty by an officer of the company as such which has caused pecuniary loss to the company. Breach of duty of course would include a misfeasance or a breach of trust in the stricter sense, and the section will apply to a true case of misapplication of money or property of the company, or a case where there has been retention of money or property which the officer was bound to have paid or returned to the company.

[His Lordship stated the facts as to the first part of the claim and said that he was unable to make an order on this summons for the amounts claimed as repayable by Mr. Ballard, because he was not satisfied that he was bound to repay them. Having then stated the facts as to the claim for the sum overdrawn for salary, his Lordship continued :] Two questions arise, firstly, when the company went into liquidation, and the employment of the respondent was about to be terminated, was he bound at once to repay the sums so overdrawn without

(1) 12 App. Cas. 652.

MAUGHAM J. 1928 ETIC, *In re.*

any set-off or counterclaim in respect of the dismissal without notice ? The second question is the question which I have already been considering as to whether such a claim can properly be raised and decided in a summary manner under s. 215. It has been strenuously argued that in the circumstances of the case Mr. Ballard was entitled to say that the sums were advanced on the terms that repayment should only be made out of salary to be earned by him. I do not see my way to decide that upon this summons, and I see a good many difficulties with regard to it. I would add that it may be that Mr. Clements has no authority to make such a contract as that with the secretary of the company. But I have come to the conclusion that I cannot properly make an order against Mr. Ballard to repay these sums under the summary jurisdiction under s. 215, because I think it is obviously just that he should have an opportunity against a claim of this kind, which at the most is a claim for repayment of an ordinary debt, advanced to him by the direction (according to Mr. Clements) of Mr. Clements himself, moneys which Mr. Ballard has had without any wrongful conduct on his part whatever, should be raised in an action in which there should be proper pleadings, and in which Mr. Ballard should be entitled to set up such set-off or counterclaim as he may be advised.

On the whole, therefore, on careful consideration I have come to the conclusion that I cannot properly make any order on this summons, and it must, therefore, be dismissed with costs, without prejudice to any proceedings by action which the liquidators may be advised to take.

Strangman. Will your Lordship allow the liquidators to reimburse ? The order, I presume, will be on the liquidators to pay, and will your Lordship allow the liquidators to reimburse themselves out of the assets in the winding up ?

MAUGHAM J. Yes.

Judgment for the respondent.

Solicitors : *Slaughter & May ; G. S. Warmington & Edmonds.*

G. P. L.

TOMLIN J.
1928
June 29.

In re VISSER.

H.M. THE QUEEN OF HOLLAND (Married Woman) *v.* DRUKKER and Others.

[1928. H. 307.]

International Law—Foreign Revenue Laws—Action for Enforcement by Sovereign of foreign State in English Court—Claim for Debt under foreign Statute—Creditor a foreign Subject—Claim for Succession Duty—English Assets of Foreigner domiciled Abroad—Cognizance of English Courts in such Proceedings—Statement of Claim—Application to strike out—R. S. C., Order XXV., *r.* 4.

The English Courts will not entertain an action by a sovereign foreign State suing in this country on a claim for revenue due from one of its own subjects.

Municipal Council of Sydney v. *Bull* [1909] 1 K. B. 7 followed.

Motion.

The question raised by these proceedings, which came before the Court by way of motion, was whether the English Courts would recognize and enforce a claim in England by a foreign State against the subjects of the foreign State in respect of revenue due from the foreign subject.

The plaintiff, H.M. The Queen of Holland, the reigning sovereign of the Netherlands, sued in an action as a married woman, and by her statement of claim alleged that she was a creditor of the estate of one David Visser deceased, who died at Amsterdam on or about December 27, 1926, a Dutch subject, domiciled in Holland.

The defendants to the action were Moritz Drukker, Israel Zeegen, and Willem Roosegaarde Bisschop. M. Drukker was the executor of the will of the said David Visser, and together with the defendant Israel Zeegen were the heirs of D. Visser. Willem Roosegaarde Bisschop was a resident in England, and, under a power of attorney from the defendant Moritz Drukker as executor of D. Visser to apply for letters of administration, was the administrator of the personal property of D. Visser in this country. Probate of the will of D. Visser was however granted on March 22, 1928, to

TOMLIN J. 1928 — VISSER, *In re.* QUEEN OF HOLLAND *v.* DRUKKER.

M. Drukker in place of Willem R. Bisschop by the Principal Probate Registry, although W. R. Bisschop still held the English assets.

The personal estate left in England by D. Visser was, after paying all proper duties and the costs of administration, of the net value of about 1150*l.* or thereabouts.

By her statement of claim, the plaintiff alleged that according to the law of Holland and in particular by the Succession Act, 1859, a Dutch statute, as subsequently amended, the estate of the said D. Visser was liable for succession duty; and she claimed that by art. 25 of the said Act of 1859, the amount of succession duty on the said estate constituted a debt from the said estate to the plaintiff, with priority over all other debts not secured by pledges or mortgages.

It was further alleged by the plaintiff that the defendants M. Drukker and Israel Zeegen were bound by art. 28 of the said Act of 1859 to furnish to the plaintiff through the proper official, a memorial in writing, specifying (inter alia) the nature and value of the estate of the said D. Visser, and by art. 18 of the said Act to pay the succession duties due thereon.

The plaintiff therefore brought an action, as above stated, in this country, claiming (inter alia) a declaration that she was a creditor of the estate of the said D. Visser, and for an order for an account. She further asked that if and so far as was necessary that the personal estate of the said D. Visser might be administered by the Court. The defendants M. Drukker and I. Zeegen were sued as executors or administrators of the said D. Visser, and the defendant W. R. Bisschop as administrator of the personal estate in England of the said D. Visser.

The defendant Israel Zeegen now moved the Court in the action for an order that the plaintiff's statement of claim be struck out under R. S. C., Order xxv., r. 4, on the ground that it disclosed no reasonable cause of action and that the action might be dismissed, and that the costs of the defendants to the action, and the defendant's own motion be taxed and paid by the plaintiff.

A. M. Latter K.C. and *H. Johnston* for the applicant, the defendant I. Zeegen. It has been a long established principle that the Courts of this country will not assist foreign States to collect their revenue. The plaintiff's claim therefore should be struck out. The rule is correctly stated in Dicey's Conflict of Laws, 4th ed., r. 54, p. 224: see *Huntington* v. *Attrill* (1); *Indian and General Investment Trust* v. *Borax Consolidated* (2), where the remarks of Sankey J. are in point; *Attorney-General for Canada* v. *Schulze* (3); *Municipal Council of Sydney* v. *Bull* (4), which it is submitted is in support of the applicant's contention and is strongly relied on.

C. A. Bennett K.C. and *Frank Gahan* for the plaintiff. This is a debt lawfully due to the plaintiff. Rights acquiesced in by the laws of a civilized country are recognized by the English Courts, and the respondent's contention that this principle has no application to the revenue laws of a foreign State is not well founded. Although the word "revenue" appeared in Dicey's Conflict of Laws in the 4th and in the 3rd (1922) editions it does not appear in the two previous editions. The authorities in support of the proposition referred to in the 3rd and 4th editions rest on very slight foundations. *Huntington* v. *Attrill* (5) does not support the respondent's contention, and is no authority for the proposition that the plaintiff cannot sue in these Courts.

[TOMLIN J. The question is really, are the English Courts to be collectors of taxes for foreign governments?]

It is submitted that in cases of this kind the aid of the Court can be invoked. Further, the case of *Municipal Council of Sydney* v. *Bull* (6) is no authority; it is the case of a foreign municipality—not a sovereign State; and is no authority against the plaintiff's contention. Here there is a debt due; and a debt can be enforced in this country which has been incurred abroad, provided you can get jurisdiction over the debtor. Again, the case of *Indian and General Investment*

(1) [1893] A. C. 150, 155.
(2) [1920] 1 K. B. 539, 550.
(3) (1901) 9 Sc. L. T. 4.
(4) [1909] 1 K. B. 7.
(5) [1893] A. C. 150, 157.
(6) [1909] 1 K. B. 7, 11, 12.

TOMLIN J. 1928 VISSER, *In re.* QUEEN OF HOLLAND *v.* DRUKKER.

Trust v. *Borax Consolidated* (1) is no authority; it is the pure construction of a contract. None of these cases, it is submitted, support the respondent's argument, or the proposition in Dicey's Conflict of Laws, 3rd or 4th editions. As for *Spiller* v. *Turner* (2), it is in the plaintiff's favour.

There are cases, such as *Cotton* v. *The King* (3) and *The Emperor of Austria* v. *Day* (4); but they are not really decisions on the point, but merely dicta, and the remarks in the judgments were not really part of the judgments in the particular case in question. In the latter case Lord Campbell was not dealing with revenue laws generally but a particular type of law—namely, smuggling. Although in the earlier cases judges have expressed their views that the revenue laws of a foreign country will not be recognized here, these expressions of opinion are only dicta; the point has never really been decided definitely, and they cannot be taken as authorities for the proposition that the Courts of this country will never enforce the revenue laws of another State: see the cases of *Holman* v. *Johnson* (5), the remarks of Lord Mansfield are simply dicta; as also in *Planché* v. *Fletcher* (6), again, it was only an observation of Lord Mansfield, and the real dispute there was concerning a contract. If the principle applies at all, it can only be in cases of contract. None of these cases really lay down the proposition so strongly put forward by the applicant. There is an American case, *Henry* v. *Sargeant* (Parker C. J.) (7); but again the point was not actually decided, but only the principle mentioned.

There are also cases, such as *Alves* v. *Hodgson* (8), where Lord Kenyon only touched on the point, and *Clegg* v. *Levy*. (9) There are cases which decide that the Courts of this country will take notice of the revenue laws of another; and the statement in the last two editions of Dicey's Conflict of Laws cannot be supported: see also *Bristow* v. *Sequeville* (10),

(1) [1920] 1 K. B. 539.
(2) [1897] 1 Ch. 911, 920.
(3) [1914] A. C. 176, 195.
(4) (1861) 3 D. F. & J. 217, 241, 242.
(5) (1775) 1 Cowp. 341, 343.
(6) (1779) 1 Doug. 251, 253.
(7) (1843) 13 New Hamp. Reps. (U. S. A.) 321, 332.
(8) (1797) 7 T. R. 241, 243.
(9) (1812) 3 Camp. 166.
(10) (1850) 5 Ex. 275, 278, 279.

where *Alves* v. *Hodgson* (1) is dealt with; and Pollock C.B.'s remarks cannot be taken as deciding the point.

The remarks of Scrutton L.J. in *Ralli Brothers* v. *Compañia Naviera Sota y Aznar* (2) show the matter is still not definitely decided: see also *The Eva.* (3) There is no authority that the Courts will not enforce foreign contracts. In the old cases, when they are considered, one sees that what really Lord Mansfield was dealing with was cases of contracts for sale of goods, and it really involved the question of free trade. None of the cases cited in Dicey really touch the point. In all these old cases the whole point was freedom of trade: see *Boucher* v. *Lawson* (4), where it is free trade Lord Hardwicke is considering. The view taken was that if you recognize the revenue laws of another country, you are interfering with freedom of trade and injuring this country.

Except for the case of *Municipal Council of Sydney* v. *Bull* (5) which, it is submitted, is not applicable to the present case, there is no direct decision laying down the principle that the Courts of this country will not recognize the revenue laws of another sovereign State.

W. Hunt for the defendant W. R. Bisschop.

James Wylie for the defendant M. Drukker.

A. M. Latter K.C. in reply. It is submitted the point has been settled long since—see *James* v. *Catherwood* (6)—and cannot now be considered.

TOMLIN J. This is an application by the defendants in the action that the plaintiff's statement of claim may be struck out on the ground that it discloses no reasonable cause of action and therefore should be dismissed. [His Lordship referred briefly to the facts as set out above.] The short ground for the application is that these Courts do not take notice of the revenue laws of a foreign State, and that the foreign State cannot sue in this country for the recovery of taxes falling to be paid under the foreign law. It seems to

(1) 7 T. R. 241, 243.
(2) [1920] 2 K. B. 287, 300.
(3) [1921] P. 454.
(4) (1734) Cases temp. Hard. 85, 89, and also p. 198.
(5) [1909] 1 K. B. 7.
(6) (1823) 3 Dow & Ry. 190, 191.

TOMLIN J. 1928 VISSER, *In re.* QUEEN OF HOLLAND *v.* DRUKKER.

be plain that at any rate for somewhere about 200 years, since the time of Lord Hardwicke, the judges have had present to their minds the notion, and have repeatedly said that the Courts of this country do not take notice of the revenue laws of foreign States. In Dicey's Conflict of Laws, 4th ed. (1927), p. 224, the rule is stated in this way. Rule 54 : " The Court has no jurisdiction to entertain an action—(i.) for the enforcement, either directly or indirectly, of a penal, revenue, or political law of a foreign State." Now it appears that that word " revenue " appeared in the rule for the first time in 1922 in the 3rd ed., p. 230 ; and in the prior editions —the 2nd ed. (p. 207) and the 1st ed. (p. 220)—it was expressed to be only for the enforcement of a " penal " law of a foreign country. " Revenue " was added in 1922, and " political " was added in 1927 ; and it now runs : " directly or indirectly, of a penal, revenue or political law. . . . ." I am now asked by Mr. Bennett to say that that is an addition that is not justified, and that the statement in the 4th edition is not well founded. Mr. Bennett argues that there has never been an actual decision in this country—at any rate except one decided comparatively recently in 1909—in support of that proposition, that what has been said has been mere obiter, and therefore ought now, to-day, for the first time, to be disregarded. His contention is that whatever may be said as to there being no authority, no actual decision, in support of the proposition, there is certainly no actual decision which definitely establishes the contrary. Of course the absence of authority for what, on the one side, is called an elementary proposition, may indicate that the proposition is not well founded in principle, but it also may merely indicate that it is so well recognized that it has never been put to the test. A number of cases have been cited, and I agree with Mr. Bennett that it is very difficult to say of any of them that it is a direct decision, with the exception of one which I will mention. The same view of the matter seems to have been taken in America, although there again the case referred to does not appear to contain a direct assertion but only a dictum, and there is no case which

supports the view that the revenue laws of a foreign country will be enforced here. Such cases as *Alves* v. *Hodgson* (1) and *Clegg* v. *Levy* (2) seem to me to be explained in *Bristow* v. *Sequeville*. (3) They really turn upon this, that where you are suing on an instrument or contract—a foreign instrument or contract—you have to establish its validity according to foreign law, but if it is valid according to foreign law, it is none the less valid because of a provision of revenue law. If, on the other hand, the revenue law does not operate to invalidate the instrument, but only affects its admissibility in evidence, then it is plain, on *Bristow* v. *Sequeville* (3), that the instrument would be admissible in evidence in our law. Now that seems to me to be the explanation of those cases, and all that those cases do is to indicate that however unwilling the Courts may be to recognize foreign law, there are certain cases in which, although they do not enforce the foreign revenue law, they are bound to recognize some of the consequences of that law—namely, those cases where, as one of the terms of the law, contracts are rendered invalid by the foreign law.

There remains the one case of *Municipal Council of Sydney* v. *Bull* (4), before Grantham J. I think it is plain that if the plaintiff there had been a foreign State instead of a foreign municipality, it would be impossible to say that it was not a direct decision in point. I do not see myself that any distinction, or valid distinction, could be drawn between a plaintiff sovereign State—a foreign sovereign State—and a plaintiff foreign municipality, seeking in the one case to recover State taxes, and in the other seeking to recover the local municipal taxes or rates: they seem to me to be in pari materia, and sitting here and being bound by the ordinary rule to follow decisions of co-ordinate jurisdiction, I should feel myself bound to treat the case of *Municipal Council of Sydney* v. *Bull* (4) as one which it was my duty to follow, and to regard this matter as, so far as Courts of first instance are concerned, disposed of by that case; and to leave it to

(1) 7 T. R. 241.
(2) 3 Camp. 166.
(3) 5 Ex. 275.
(4) [1909] 1 K. B. 7.

TOMLIN J.
1928
VISSER, *In re.* QUEEN OF HOLLAND *v.* DRUKKER.

higher jurisdictions to determine whether the rule ought to be maintained. That is apart from my own opinion. My own opinion is that there is a well recognized rule, which has been enforced for at least 200 years or thereabouts, under which these Courts will not collect the taxes of foreign States for the benefit of the sovereigns of those foreign States; and this is one of those actions which these Courts will not entertain. That being so, this application must succeed. The statement of claim must therefore be struck out and the action dismissed; and, as the sovereign State has submitted to jurisdiction by coming here, I am in a position to order the sovereign State to pay the costs of the action.

Solicitors: *Waltons & Co.; Matthew J. Jarvis; Speechly, Mumford & Craig; Linklaters & Paines.*

A. R. T.

TOMLIN J.
1928
June 20, 21, 22.

DAVIES *v.* CORPORATION OF RIPON.

[1927. D. 992.]

Local Government—"Street" Country Lane—Power of Local Authority to lay Gas and Water Mains—Character of Land—Subsequent Change—Building Development—"Land not dedicated to public"—Consent of Owners to laying Pipes—Local Authorities' special Act—Gasworks Clauses Act, 1847 (10 *&* 11 *Vict. c.* 15), *ss.* 6, 7—*Waterworks Clauses Act*, 1847 (10 *&* 11 *Vict. c.* 17), *ss.* 28, 29—*City of Ripon Act*, 1865 (28 *Vict. c. cxxvi.*), *s.* 2—*Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 54—*Ripon Corporation Act*, 1886 (49 *&* 50 *Vict. c. lxvii.*), *ss.* 2, 4—*Ripon Corporation Act*, 1901 (1 *Edw.* 7, *c. ccxlvi.*), *ss.* 3, 37—*Public Health Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 71), *s.* 80.

By the Gasworks Clauses Act, 1847, s. 6, a local authority may in effect lay down gas pipes in streets, but by s. 7, if in any land not dedicated to public use, only subject to the consent of the owners or occupiers thereof. This in effect is not confined to that which is a street, but extends to all land not dedicated to the public, provided the required consent is obtained. A country road with bungalow residences abutting thereon, but over which there existed no public right of way, might fairly be said to come within the description of "street" within the definition of "street" in the Gasworks Clauses Act, 1847.

Therefore, where a local authority with the consent of the owners laid gas pipes along such a road (formerly purely agricultural), it was held that they were within their statutory rights. And the same will apply

to the laying of water pipes by virtue of the Waterworks Clauses Act, 1847, ss. 28, 29, which are in almost identical language as the Gasworks Clauses Act, 1847, ss. 6, 7.

Further also, where the local authority in question had under their special Act (the Ripon Corporation Act, 1901, s. 37), power, upon the application of the owner or occupier of premises within their water area abutting on any street laid out but not dedicated to public use, to supply such premises with water and to lay down pipes for furnishing such supply, the physical conditions of the land must govern, and it is not necessary whenever an application is made to such local authority for a supply of water, on the footing that the applicant has premises abutting on the street laid out but not dedicated to public use, for the local authority to go into the title of each applicant to see whether in law he had adequate rights of way over the "street laid out but not dedicated to public use" as a means of access to his house.

Therefore such a road as mentioned above may be a street laid out though not dedicated to the public within the section; and the corporation having complied with the terms thereof, the section applies.

Further, as regards the supply of gas, the same conditions apply under the Public Health Act, 1925, s. 80, as under the special Act of the local authority; and on proof of the pipes being laid pursuant to the section, the local authority is protected.

WITNESS ACTION.

In this case the facts, which are fully set forth in the judgment of Tomlin J., are shortly as follows:—

By three several deeds of conveyance executed in 1926, certain plots of freehold land situate on the north side of Clotherholme Lane, near Ripon, in the county of York, were conveyed to the plaintiffs in fee simple as follows: By the first deed dated December 13, 1926, William H. Hutchinson and W. Steel, as personal representatives of one John F. Hartley (who died in 1917, seised in fee simple in possession of the land in question free from incumbrances), conveyed unto the two first named plaintiffs William Henry Davies and Margaret Davies his wife, in fee simple as joint tenants, a piece of grass land containing about two acres or thereabouts, numbered 71 on the Ordnance plan annexed to the deed, and situate on the west side of and adjoining a road called Lark Lane, which ran northwards directly out of the road, Clotherholme Lane, and subject as therein mentioned.

By the second deed also dated December 13, 1926, a certain piece of grass land, numbered 70 on the Ordnance Survey map,

TOMLIN J. 1928 DAVIES v. RIPON CORPORATION.

containing about three acres, and also situate on the west side of Lark Lane and adjoining the southern boundary of 71 above mentioned, together with such part of Lark Lane itself as adjoined thereto from its junction with Clotherholme Lane, was conveyed by the same vendors as in the first deed to the plaintiff Mrs. Margaret Davies alone, in fee simple and subject as therein mentioned.

By the third deed dated December 28, 1926, a further piece of grassland numbered 78 on the Ordnance map, containing about eight acres, was conveyed also by the same vendors to the last named plaintiff John H. Coldbeck in fee simple. Such land adjoined No. 71, being on the north side thereof, and was bounded on the east to its full extent by Lark Lane. There was also conveyed to the plaintiff J. H. Coldbeck a right of way over Lark Lane from Clotherholme Lane.

In their statement of claim all three plaintiffs alleged that in the case of the pieces of land numbered 70 and 71, such part of Lark Lane as abutted thereon was included in the land so numbered but not the fence on the eastern side thereof, but in the case of the piece of land numbered 78, the whole of such part of Lark Lane as abutted thereon was included, together with the hedge or fence on the eastern side. This the defendant corporation did not admit.

At the time of their respective purchases the plaintiffs, with the possible exception of Mr. W. H. Davies, were unaware that there were certain gas and water mains laid by the defendant corporation along Lark Lane and under the land purchased by them. Such mains were laid during the war by the military authorities, who had taken over a large area of land, including the land purchased by the plaintiffs, for the purposes of a camp. After the military authorities had ceased to use the land and had given up their tenancy of it, the defendant corporation took over these gas and water mains and constructed others for the convenience of persons who had purchased some of the hutments erected by the military, and had converted them into bungalows.

On the plaintiffs obtaining possession of the plots purchased by them, the corporation were informed of the plaintiffs having discovered the existence of these mains. Negotiations and correspondence ensued, and an agreement between the parties for the payment by the corporation for an easement to be granted by the plaintiffs was proposed, but was not carried into effect.

The plaintiffs alleged that the defendants had wrongfully placed these gas and water pipes under Lark Lane, and further that the defendants had no such rights over Lark Lane belonging to the plaintiffs, and which, so far as it existed before the war, was used (except while it was in military occupation) and always had been used by the plaintiffs and their predecessors in title as a way for ordinary agricultural purposes, and never was laid out as a street nor came within any of the powers of laying pipes or was otherwise vested in the defendants.

The defendant corporation (inter alia) relied on the Gasworks and Waterworks Clauses Acts, 1847, ss. 6 and 28 respectively; the Public Health Act, 1925, s. 80; and their private Act, the Ripon Corporation Act, 1901, s. 37.

Gover K.C. and *F. H. L. Errington* for the plaintiffs. The defendants have wrongfully infringed the plaintiffs' rights in the land. Lark Lane is not a "street," and the defendants have no statutory powers enabling them to lay gas or water mains under the soil. The defendants rely on powers to lay pipes for both gas and water mains on the Gasworks Clauses Act, 1847, ss. 6 and 7 (1); and the Waterworks Clauses Act,

(1) Gasworks Clauses Act, 1847, s. 6: "The undertakers, under such superintendence as is hereinafter specified, may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open and break up any sewers, drains, or tunnels within or under such streets and bridges, and lay down and place within the same limits, pipes, conduits, service pipes, and other works, and from time to time repair, alter, or remove the same, ... doing as little damage as may be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers."

Sect. 7: "Provided always, that nothing herein shall authorize or

TOMLIN J. 1928 DAVIES v. RIPON CORPORATION.

1847, ss. 28 and 29. (1) These sections are practically identical in language, and as to the water pipes, the defendants say these sections give them power. It is submitted there is no power under s. 28 standing alone (1); they might have the power if, under s. 29 as well, they had obtained the consent of the owners or occupiers, which they have not. Sect. 28 refers to "streets," that is "public streets," which is not the case here.

[TOMLIN J. The onus is on the plaintiffs to establish that these pipes were wrongfully laid.]

The plaintiffs by their statement of claim allege it was wrongful.

[TOMLIN J. It must be proved that the action of the defendants was wrongful.]

It is submitted that if the plaintiffs can establish this lane is not a "street," the onus is shifted to the defendants.

The meaning of the word "street" under the Gasworks Clauses Act, 1847, was discussed in *Maddock* v. *Wallasey*

empower the undertakers to lay down or place any pipe or other works into, through, or against any building, or in any land, not dedicated to public use, without the consent of the owners and occupiers thereof; except that the undertakers may at any time enter upon and lay or place any new pipe in the place of an existing pipe in any land wherein any pipe hath been already lawfully laid down or placed in pursuance of this or the special Act or any other Act of Parliament, and may repair or alter any pipe so laid down."

(1) Waterworks Clauses Act, 1847, s. 28: "The undertakers under such superintendence as is hereinafter specified, may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open and break up any sewers, drains or tunnels within or under such streets and bridges, and lay down and place within the same limits pipes, conduits, service pipes and other works and engines, and from time to time repair, alter, or remove the same, and for the purposes aforesaid remove and use all earth and materials in and under such streets and bridges . . . . doing as little damage as can be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers."

Sect. 29: "Provided always, that nothing herein contained shall authorize or empower the undertakers to lay down or place any pipe, conduit, service pipe or other work in any land not dedicated to public use, without the consent of the owners and occupiers thereof, except that the undertakers at any time may enter upon and lay or place any new pipe in the place of an existing pipe in any land wherein any pipe hath been already lawfully laid down or placed in pursuance of this or the special Act, or any other Act of Parliament, and may repair or alter any pipe so laid down."

Local Board. (1) One must look at the defendant corporation's special Acts. By the Ripon Corporation Act, 1886, s. 2, the Waterworks Clauses Act, 1847 (2), is incorporated, and by s. 4, the Act is to apply to Ripon and neighbouring townships. By the Ripon Corporation Act, 1901, s. 2 also incorporates the Waterworks Clauses Act, 1847, with a few exceptions; and by s. 37, they are given power to lay pipes not dedicated to public use. (3) Both these Acts apply to waterworks.

The word "street" in the section must be a street within the ordinary acceptation of the word; it cannot apply to the plaintiffs' property, which is not a "street." A street must be laid down as one for the erection of houses, shops, or other buildings. If the question depends on s. 37, it does not empower the defendants to do what they did.

As regards the supply of gas, the defendant corporation have the City of Ripon Act, 1865, which, by s. 2, incorporates the Gasworks Clauses Act, 1847, with a few exceptions.

Further powers of local authorities as to laying pipes for gas and water pipes in private streets are to be found in the Public Health Act, 1875, s. 54 (4); and one must also refer to s. 16; and the Public Health Act, 1925, s. 80. (5) The

(1) (1886) 55 L. J. (Q. B.) 267; 50 J. P. 404.

(2) See note (1) ante, p. 888.

(3) Ripon Corporation Act, 1901, s. 37: "The corporation may on the application of the owner or occupier of any premises within their water limits abutting on or being erected in any street laid out but not dedicated to public use supply such premises with water and may lay down take up alter relay or renew in across or along such street such pipes and apparatus as may be requisite or proper for the furnishing such supply."

(4) Public Health Act, 1875, s. 54: "Where a local authority supply water within their district, they shall have the same powers and be subject to the same restrictions for carrying water mains within or without their district as they have and are subject to for carrying sewers within or without their district respectively by the law for the time being in force."

(5) Public Health Act, 1925, s. 80, sub-s. 1: "If the local authority are authorised to supply gas or water, they may, on the application of the owner or occupier of any premises within their limits of supply, abutting on any street laid out but not dedicated to public use, supply those premises with gas or water, as the case may be, and lay down, maintain and repair pipes in such street, and for the purposes of this section the Gasworks Clauses Act, 1847, and the Waterworks Clauses Act, 1847, shall apply as if section seven of the former Act and section twenty-nine of the latter Act had been excepted from incorporation with the Acts relating to the local authority."

TOMLIN J.
1928
DAVIES
v.
RIPON
CORPORATION.

Public Health Act, 1925, cannot apply as regards water powers, because it is not retrospective. In any case both the Acts of 1847 relate to "streets," and a street must be a "street" within the ordinary meaning of the word; it is not a street in this case in the proper sense; nor further, has the consent of the owners been obtained. What is a "street" was discussed in *Attorney-General* v. *Laird.* (1) Further, in the Public Health Act, 1875, s. 4, "street" is defined as including "any highway (not being a turnpike road), and any public bridge (not being a county bridge), and any road lane footway square court alley or passage whether a thoroughfare or not."

It cannot be said this lane falls within that definition, nor does the same principle of construction apply to questions arising on the meaning of the word under the two Acts of 1847 as under the Public Health Acts. See also *Robinson* v. *Local Board of Barton-Eccles* (2): a "street" must have houses along it.

As regards the laying of gas mains under occupation roads, a case under the Gasworks Clauses Act, 1847: see *Selby* v. *Crystal Palace Gas Co.* (3)

As to a "street laid out": see *Armstrong* v. *London County Council* (4); *Allen* v. *Fulham Vestry* (5); *Taylor* v. *Oldham Corporation.* (6) The only powers which the defendants have for laying pipes are referred to under the Acts; and none of these powers are applicable to the plaintiffs' property. It is not a "street," and whether with or without consent, the land must come within the meaning of the word "street," which it is not.

Gavin Simonds K.C. and *H. C. Bischoff* for the defendants. It is submitted that the Court will assume that the pipes were lawfully laid unless the plaintiffs can prove that by no means could they have been lawfully laid, and no evidence has been produced to that effect. The plaintiffs acquired

(1) [1925] Ch. 318, 326, 334.
(2) (1883) 8 App. Cas. 798, 801.
(3) (1862) 4 D. F. & J. 246; 31 L. J. (Ch.) 595, 597.
(4) [1900] 1 Q. B. 416.
(5) [1899] 1 Q. B. 681.
(6) (1876) 4 Ch. D. 395, 407.

the property in 1926 with these pipes lawfully laid under the soil, and their claim therefore fails.

The Acts of 1847 apply, and ss. 6 and 7 of the Gasworks Clauses Act, for example, are relied on. The corporation have the power to enter and lay down new pipes and do other works. But if the defendants cannot succeed under these Acts, they rely further on their own special Act of 1901, s. 37, as regards the water pipes; and on the Public Health Act, 1925, s. 80, for both gas and water, if pipes were laid before 1925.

Gover K.C. in reply. As regards the pipes being lawfully laid, the defendants cannot rely, as regards water, on the Public Health Act, 1925, but only on their Act of 1901, or the Clauses Acts of 1847. And only if the land was dedicated to public use. It was not so dedicated; it was not laid out as a street by the owner. As regards gas, the same considerations apply.

TOMLIN J. This is an action in which three plaintiffs, who are the owners in fee of certain plots of land in the neighbourhood of Ripon, seek a declaration that the defendants, who are the corporation of Ripon, are not entitled to lay, and are not entitled to maintain or repair the gas and water pipes on any part of the lands belonging to the plaintiffs or any of them; and in particular on any part of such lands now known as Lark Lane, and they ask for an order on the defendants to remove the pipes, and an injunction to restrain the defendants from laying pipes in or under the lands and from maintaining, repairing or using the pipes already laid, and trespassing upon the land, and they claim damages and other relief.

Before 1914 an estate in the neighbourhood of Ripon, situate on the north side of a lane or road known as Clotherholme Lane, was the property of a Dr. J. F. Hartley; it was agricultural land, its southern boundary being Clotherholme Lane. I am not quite sure if the estate ran right up to the Kirkby Malzead road, but the road formed the northern boundary of the estate, or at any rate passed

TOMLIN J. 1928 DAVIES v. RIPON CORPORATION.

within a field or two of its northern boundary. The eastern boundary was the line formed by a thorn fence running more or less north and south, which separated it from land on the east belonging to other parties. There ran up from Clotherholme Lane on the west side of this thorn fence a soft occupation road which, leaving Clotherholme Lane, as I say, on the west of the thorn fence, ran up the east side of a field marked on the Ordnance map as No. 70, and was separated from the field also by a second thorn fence, so that the lane at that point ran between two thorn fences. The lane then followed the eastern thorn fence along the next field, which is No. 71, being again separated from that field by the thorn fence on the west of the lane, there being an entrance into No. 71 through a gate in that thorn fence, and it ended at a gate which led into the top field No. 78, so that it was really a short occupation lane leading from Clotherholme Lane to No. 78, across Nos. 70 and 71, with thorn fences on each side. The witness who farmed the land with his father for many years before the war has given me a description of the lane which I have no doubt is substantially accurate. He says that it was a narrow lane, that two farm carts, at any rate loaded, could not pass in it, and indeed, as I understood him, at harvest time, when they wanted to get their harvest out of the field, whether hay or corn, they had to brush up the fences before they could conveniently get a loaded wagon down the lane.

In 1914 came the war, and, with the war, into this neighbourhood also came the War Office, who took possession of a large area of land, including the land of Dr. Hartley, and the land to the east of Dr. Hartley's estate, that is, on the east side of the thorn hedges which formed the boundary of the lane, and a large military camp containing, I am told, something like 40,000 troops was formed in the neighbourhood and on the site. It perhaps is not surprising that in those circumstances a substantial change took place in the physical appearance of the ground. The military made roads and erected hutments, laid pipes for water for the supply of the hutments, and no doubt produced that general air of desolation

which is common to areas subject to these kind of operations. In the course of them, this lane, to which I have just referred, called Lark Lane, was turned into a made macadam road; it was driven right through from Clotherholme Lane to the Kirkby Malzead road on the north, the thorn hedge in most places on each side was cut down, branch roads for military purposes were constructed out of it, and, so far as appearance was concerned, by a year or two after the war, it had assumed, as I gather from the photographs and the descriptions of the witnesses, a physical aspect very little different from any other public road in the neighbourhood.

The military gave up the land to the east of Lark Lane, I think, some years before they gave up Dr. Hartley's estate, and they, so I understand, sold the hutments on this land, and the owner of the land developed it more or less as a residential property, so that to-day on the east side of Lark Lane there are quite a number of bungalow residences. The military authorities, during their occupation and for the purpose of supplying their camp with water, appear to have made an arrangement with the corporation of Ripon for the supply of water in bulk at some point south of Clotherholme Lane; and from the point at which the water was delivered through a meter to the military authorities, the military authorities conducted it themselves by a system of mains and pipes of their own, and which were laid throughout the area of the camp. One of those pipes or mains was a main which crossed Clotherholme Lane, and ran into Dr. Hartley's property, it ran across the close of land No. 70, more or less east and west, and across Lark Lane, and then by a roadway, which the military had made running north-east out of Lark Lane, and thence northward more or less parallel with Lark Lane, and behind the bungalows which stand to-day on the east side of Lark Lane. There came a time when the activities of the military on this site had diminished, and they made an arrangement with the corporation for the corporation to take over the pipe system of the War Office, the corporation undertaking to continue a supply of water to

TOMLIN J. 1928 DAVIES v. RIPON CORPORATION.

such premises as were still in the occupation of the military. That was accordingly done, I gather, somewhere about 1922 or thereabouts, and, when they took over that pipe system, the corporation, in order to supply water to a factory which had then sprung up on the site of part of the camp at a place called Ashgrove (which lies in the corner between Lark Lane and the road branching from it, to which I have already referred), removed the pipe line across No. 70, relaid it along Clotherholme Lane and up Lark Lane to its junction with the roadway to which I have referred, and there connected up the new pipe line with the old pipe line that ran along that roadway, leaving the service of water to the buildings at the north end of Lark Lane still operating by means of that existing pipe line running up the back of the bungalows. At the same time that pipe line was not available for the service of water to the bungalows lower down but only to those at the extreme north end; and applications were received by the corporation from the occupants of those bungalows to supply them with water. Thereupon the corporation, in 1923, extended the main in Lark Lane, from the point where it then ended at the junction with the branch roadway, up Lark Lane to a point at which the bungalows end, that is something more than half-way up the lane to the Kirkby Malzead Road; and therefrom supplied the bungalows, which had theretofore been without water, with water from their general supply. Since then that supply has been continued and is being continued.

While all this was going on, the military still remained in occupation of Dr. Hartley's land on the west side of Lark Lane. Dr. Hartley himself died in 1917, and two gentlemen (one of whom was Mr. Hutchinson, a solicitor) were his executors. It was not until July, 1926, that possession of Dr. Hartley's estate was handed over to his executors; but in the meantime, namely, in February, 1926, the corporation had approached Mr. Hutchinson as the solicitor to the Hartley estate and one of the executors, for leave to lay gas mains along Lark Lane for the supply of gas to the bungalows in question. On that occasion, according to the evidence of

Mr. Hutchinson, he was informed of the presence of the corporation's water pipes in Lark Lane used for the supply of water to the bungalows. Mr. Hutchinson gave his consent to the laying of the gas mains, and he gave his consent, quite plainly, as he told me, on behalf of himself and his co-executor, the owners for the time being of the Hartley estate. It is also plain, from what he said, that being made aware of the presence in the soil of the water pipes laid by the corporation, he regarded that as an advantage from the point of view of the building estate, inasmuch as they, that is, the executors, held this estate upon trust for sale. He said in evidence: "One of the attractions was the gas and water in Lark Lane; I had no objection whatever to the main"—that is the water main—"in Lark Lane; I considered it better to leave the water pipes in. In July of 1926 I resumed possession; I knew of the water pipes; I might have objected if some one had tried to remove them." I think it is plain, therefore, that from the time when he learned of their presence in February, 1926—when he was asked to give his consent by the corporation to the laying of the gas mains—he deliberately from that time forward allowed the corporation to continue the mains there upon the footing that they were there with his authority and consent; and that when he took over the property in July, 1926, it is plain he took it over knowing that under Lark Lane there was a system of pipes for the supply of gas and water which he considered advantageous from his point of view as calculated to assist him in realizing the estate to advantage.

In that state of affairs the property was put up for sale by Mr. Hutchinson and his co-executors. There was an auction sale. The property was not sold, and eventually in October, 1926, contracts for sale were entered into between the executors and the present plaintiffs. One of the plaintiffs, Mr. J. H. Coldbeck, is the owner of field No. 78. The field No. 71 is the joint property of Mr. and Mrs. Davies, and the bottom field, No. 70, is the property of Mrs. M. Davies alone. The conveyances themselves are not wholly fortunate

TOMLIN J. 1928 DAVIES v. RIPON CORPORATION.

in their description of the parcels; and there may be in the conveyance, at any rate of field No. 70, some question as to what precisely passed under it, but assuming there passed under it all the site of Lark Lane so far as it belonged to Dr. Hartley, the position is this: that the plaintiffs are asserting, first of all, that the pipes in question are laid under their property; and, secondly, they ask for a declaration that the pipes were unlawfully laid in the first instance and are unlawfully there to-day.

Now it seems to me that the onus is on the plaintiffs to establish, first, that the pipes are under their land, and, secondly, that (they having purchased the property with the pipes under it), such pipes were improperly laid or, at any rate, were improperly under the land when it was purchased by them.

I think it will be convenient just to deal with the question of the site first of all. I have a plan of Lark Lane, which has been prepared by a surveyor called by the plaintiffs, and he has explained to me quite fairly how he has done it. There are in one or two places traces of the old thorn fence which formed the boundary of Lark Lane or which was in the field No. 78 north of the point where Lark Lane ended. So far as the eastern hedge is concerned, I think I am right in saying that the only place where the hedge remains is down at the south end of the Lane on the east side. There is no trace of the old thorn fence itself higher up on the east side until you get at any rate to a point which is right up in the north part of field No. 78; there seems to be some of it up there. The fence on the west side, as will be remembered, only extended south of field No. 78, because the Lane itself ends at the southern end of No. 78. There are short pieces of the old western fence at two or three places on the west side. Now what the witness did was this: he apparently took the 25 inches Ordnance map and obtained an enlargement of it, using the small pieces of thorn fence which remained on the west side of the Lane as his datum points, and by means of the enlargement, projected what he thought was the line of the eastern hedge; and then, having ascertained that, he seems to have made an examination as to the presence of

ditches. He then came to the conclusion that in the lower part of the Lane there was a ditch on the west side of the east fence, but that on the upper part, in field No. 78, there was a ditch on the east side of the eastern fence, and—taking what I understand is a convenient rule often applied in the north, that you must allow 3 feet 9 inches from the centre of the hedge on the ditch side to ascertain the boundary—he indicates what he regards as the boundary between Dr. Hartley's estate and the estate on the east. Then, having in that way fixed his fence and his boundary, he locates the pipes, and he reaches a conclusion as to how far the pipes are on the land of Dr. Hartley. I say at once, that if this action was going to depend on the proof of the location of the pipes, I should certainly come to the conclusion, that so far as the owners of Nos. 70 and 71 are concerned, they have not made out that any part of the pipes are within their property. Accepting the plaintiffs' witness's plan as an accurate plan—so far as it is possible by such methods to produce an accurate plan—it shows encroachments of so slight a character that, having regard to the possibilities of error which are available in the methods employed, I think it would be impossible to say that there has been proved to the reasonable satisfaction of the Court that the pipes are under the land at all. The plan itself shows how trifling are the alleged encroachments, even upon all the assumptions which are made by the surveyor in preparing the plan. That, of course, does not apply to the plaintiff Coldbeck, whose claim is in respect of what has occurred on No. 78. So far as he is concerned, it seems reasonably plain that the pipes are well on the west side of the hedge or thorn fence, which was the eastern boundary of No. 78, and I think probably the right conclusion in his case would be that the pipes were under his land. Of course so far as the other two plaintiffs are concerned, that finding of fact would dispose of the action; but there are other grounds, in my judgment, even if the facts were otherwise and if it were satisfactorily proved that all these pipes in each case were under the lands of the plaintiffs, why the action should not succeed.

TOMLIN J.
1928
DAVIES v. RIPON CORPORATION.

Now the corporation rely on their various statutory powers. Those statutory powers include the powers of the Clauses Acts appropriate to gas and water, and in particular, ss. 6 and 7 of the Gasworks Clauses Act, 1847, and ss. 28 and 29 of the Waterworks Clauses Act, 1847; and for the purpose of coming to a conclusion as to whether those powers are available to the corporation, there is no real difference between the two sets of sections. I may conveniently take the gas sections for the purpose of stating my views upon them. The Gasworks Clauses Act, 1847, ss. 6, 7, provide that: [His Lordship read the sections. (1)] Under s. 3 of the Act: "The word 'street' shall include any square, court, or alley, highway, lane, road, thoroughfare, or public passage or place within the limits of the special Act." I think it is plain that, so far as that definition is concerned—and I think Mr. Gover, at any rate at the later stage of his argument, accepted the view—it is not confined to streets which are subject to public rights of way; it is wide enough to include a thing which is a street, but over which there is no public right of way. The question, "What is a street?" of course is another matter, because it may be that there is to be imported into the word "street" in the Gasworks Clauses Act, 1847, the same element as there is imported into the word "street" in the Public Health Act, 1875; the element of a "street," being something which has buildings along it to some extent, so as to constitute what is known colloquially as a street, that is, a roadway passing between a certain number of buildings on each side. Assuming that element is present in the definition of "street" in the Gasworks Clauses Act, 1847, and I do not think it is necessary for me to rule definitely aye or no whether that element is present in the definition or not, it seems to me that although there is no public right of way over Lark Lane, yet having regard to the character of the buildings now along it, it would fairly come within the description of "street," assuming that that characteristic I have mentioned is imported into the definition. But whether it is a street or is not, it seems to me plain that,

(1) See note (1) ante, p. 887.

if the corporation were to lay pipes in it with the consent of the owners and occupiers, they would have been doing something which would be lawful under the Gasworks Clauses Act, 1847, s. 7, because s. 7 is a proviso not merely on s. 6, but upon the Act generally; and the section in effect says that, where you lay pipes in land which is not dedicated to the public, the section is not confined to that which is a street, but extends to land not dedicated to the public; although you have to get the consent of the owners and occupiers. So therefore it is not really very material what is the precise definition of "street," or whether this land is a "street" within the definition. It seems to me clear that the corporation could, with the consent of the owners and occupiers, have laid pipes in this land.

So far as the gas pipes are concerned, the corporation clearly laid them with the consent of the owners. It is suggested that they did not lay them with the consent of the occupiers, because it is said that the military did not give up possession until July, 1926, and as the consent of the owners was given in February, 1926, at that time the military were still in possession. Of course if I am right about the position of the pipes the question does not arise; but on the assumption that the pipes are in the land and the land was still in the occupation of the military, that is no doubt strictly true, but, inasmuch as those particular occupiers ceased their occupation and the owners, who had assented, entered into occupation in July, 1926, it is plain that, as against the corporation, the pipes were in July, 1926, lawfully in the land so far as the gas is concerned.

So far as the water is concerned, I think there is no evidence directly that the military consented or did not consent, I think the fair inference is that they did consent, because the whole arrangement of the lay out of the water was by arrangement between the corporation and the military. But the owners did not consent in 1923 to the laying of the water pipes. The owners only learned about it in February, 1926, and they learned about it in connection with the arrangement by which they gave their consent

TOMLIN J. 1928 DAVIES v. RIPON CORPORATION.

to the laying of the gas pipes. I have already dealt with Mr. Hutchinson's evidence on this point, and I will only say this: that it is, in my judgment, the only reasonable and possible inference to draw from the evidence that Mr. Hutchinson accepted the position of the pipes being properly laid in the land, and that in July, 1926, when he took over the land from the military, as between him and the corporation, all the pipes, both gas and water, were properly in the land.

That being so, in my view, in the events which have happened, the Gasworks Clauses Act, 1847, s. 7, and the corresponding section of the Waterworks Clauses Act, 1847, s. 29, can be relied upon.

But it does not stop there. Under their private Act—the Ripon Corporation Act, 1901—the corporation in regard to water have a section giving them power to lay pipes in streets not dedicated to public use. It is as follows. Sect. 37 of the Ripon Corporation Act, 1901: "The corporation may on the application of the owner or occupier of any premises within their water limits abutting on or being erected in any street laid out but not dedicated to public use supply such premises with water and may lay down take up alter relay or renew in across or along such street such pipes and apparatus as may be requisite or proper for the furnishing such supply."

I should say that all the land under consideration in this action, whether it be within the limits of the borough or not, is within the area of supply both of gas and water of the corporation. The corporation say, and they have proved by the evidence of their water engineer, that they laid the pipes in Lark Lane for water in order to comply with applications of the owners or occupiers of premises along Lark Lane, and that they claim that they are therefore protected under s. 37. It is said, on the other hand, by the plaintiffs: "No, that is not so, because this land is not laid out as a street"; and the plaintiffs assert, but I may say they have not proved it, that the persons who are occupiers of the bungalows, have no right of access to the Lane. I do not mean

physical access, because they obviously have physical access thereto, and obviously use Lark Lane; but they say they have in law no right to come out of their bungalows and use the Lane, and that, in those circumstances, Lark Lane is not laid out as a street within the meaning of s. 37. I think for the purposes of a section such as this it is the physical conditions which must govern the matter; it seems to me impossible to so construe the section that on every occasion on which there is an application to the corporation for a supply of water or gas, upon the footing that the applicant has premises abutting or erected in a street laid out but not dedicated, that the corporation should have to investigate the title of the applicant to see whether in point of law he has adequate rights of way which entitled him to use that which was alleged to be a "street laid out but not dedicated" as a means of access to his house. Such a construction, I think, would be unreasonable; it is not demanded by the words, and I hold that this section must be considered with reference to the physical conditions, and that, on the evidence before me, the physical conditions at all material times have been such that this was a street laid out though not dedicated to the public, and that, that being so—the corporation having proved that they laid the mains in answer to the applications of the purchasers whose premises were abutting on or erected in the street—that s. 37 applies to the water main.

There is yet one other section, and that is s. 80 of the Public Health Act, 1925, which applies both to gas and water pipes; but inasmuch as it was passed after the water pipes in this case were laid, it is directly applicable only to the gas pipes. There again the same considerations which are applicable to the Ripon Corporation Act, 1901, s. 37, will arise. The section is as follows (s. 80): "If the local authority are authorised to supply gas or water, they may, on the application of the owner or occupier of any premises within their limits of supply abutting on any street laid out but not dedicated to public use, supply those premises with gas or water, as the case may be, and lay down, maintain

TOMLIN J. 1928 DAVIES v. RIPON CORPORATION.

and repair pipes in such street. . . . ." Then there is an incorporation of the Gasworks and Waterworks Clauses Acts, and so on. The observations which I have already made with reference to s. 37 of the Ripon Corporation Act, 1901, apply with equal force to s. 80 of the Public Health Act, 1925, and in my judgment, that being so, the pipes were in their inception laid under that section.

That being so, the result is this: that in my view the plaintiffs bought their lands with the pipes properly under them, and the action, therefore, necessarily fails. Of course the conclusions to which I have come have no bearing upon any question which may arise between the plaintiffs and those who claim rights of way over the road. I think the action fails, and must be dismissed with costs as between solicitor and client.

Solicitors: *Collyer-Bristow & Co., for Titley & Paver-Crow, Harrogate; Sharpe, Pritchard & Co.*

A. R. T.

ASTBURY J. 1928 *July* 23, 24.

GRANT *v.* DERWENT.

[1927. G. 1428.]

Covenant—Restrictive Covenant of 1876*—Minimum Cost of Buildings—Buildings erected in* 1927*—Increase of building Costs—Original Minimum adhered to—Construction of Covenant.*

Sewers—Connecting Pipe—Sewer in Public Road—Soil of Road in Private Ownership—Premises abutting on Road—Right to connect Drain through Subsoil—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 21*—Public Health Acts Amendment Act,* 1890 (53 *&* 54 *Vict. c.* 59), *s.* 18*—Wimbledon Corporation Act,* 1914 (4 *&* 5 *Geo.* 5, *c. clxiv.*), *s.* 84.

The plaintiff and defendant both derived title to their respective properties from a common predecessor who on his own purchase of both properties in 1876 had covenanted with his vendors not to erect any dwelling-house at a less cost price than 800*l.* or any pair of semi-detached villas at a less cost price than 1200*l.*

In 1927 the defendant built houses at prices exceeding these amounts, but these houses, owing to the great increase of building prices since 1876, were not of the type indicated by the prices of that date.

The plaintiff sued for an injunction :—

Held, that even if the plaintiff had been entitled to enforce the 1876 covenants against the defendant, which, failing allegation and proof of a building scheme at that date, he could not do, the defendant had not in fact broken those covenants, which, on construction, related to the building prices ruling at the time the houses were actually erected.

Subject to the rights of the Wimbledon Corporation as highway and sewer authority the plaintiff owned the soil of a public road with a Corporation sewer therein.

The defendant's property abutted on this road, as well as on another sewered road, and he was entitled under s. 21 of the Public Health Act, 1875, to cause his drains to empty into the Corporation sewers on giving proper notice and complying with their regulations.

At the defendant's request and acting under s. 84 of the Wimbledon Corporation Act, 1914 (which section is a little wider than s. 18 of the Public Health Acts Amendment Act, 1890), the Corporation connected the defendant's combined drain (already approved by them for draining the defendant's houses in combination under s. 81) with the sewer in the plaintiff's road, carrying the connecting pipe through a small portion of the plaintiff's subsoil.

The plaintiff sued the defendant for damages for trespass on his subsoil.

Held, that the Corporation's acts were fully justified by s. 84 of the Wimbledon Act, even if not by the Public Health Acts, and that whatever right for compensation the plaintiff might have against the Corporation for damage sustained by reason of the exercise of their statutory powers, he had no cause of action against the defendant for requesting the Corporation to exercise those powers.

Wood v. *Ealing Tenants, Ld.* [1907] 2 K. B. 390 distinguished.

WITNESS ACTION.

By a conveyance on sale dated August 11, 1876, certain lands in Wimbledon were conveyed to Humphrys, who covenanted with his vendors (inter alia) not to erect or suffer to be erected thereon any dwelling-house (exclusive of out-buildings) at a less cost price than 800*l.* or any pair of semi-detached villas at a less cost price than 1200*l.*

Similar covenants affecting these and other lands had been imposed on the vendors' predecessors by a conveyance of December 16, 1852, and by a conveyance on sale dated September 5, 1905, a portion of the other lands was conveyed by another owner to the plaintiff subject to the covenants of 1852 (which he did not covenant to observe).

By a conveyance on sale dated September 28, 1905, Humphrys' executors and trustees for sale conveyed Blackacre, part of the Humphrys' lands, to the plaintiff,

ASTBURY J. 1928 GRANT v. DERWENT.

subject to the covenants in the conveyance of August 11, 1876, which the plaintiff covenanted to perform and indemnify the vendor therefrom.

Blackacre lay to the south of Cottenham Park Road and included a strip of land running east to Durham Road. This strip had a local board sewer underneath. The plaintiff subsequently laid out a street known as Melbury Gardens along this strip. For many years this street had now been a public highway with the public sewer thereunder. In 1926 the Wimbledon Corporation decided to take the road over and made it up at the cost of the frontagers, but it was not formally declared a public road repairable by the inhabitants at large under s. 152 of the Public Health Act, 1875, until June 9, 1927. Subject to the rights of the Wimbledon Corporation as sewer authority and road authority the soil of the road remained vested in the plaintiff.

The defendant also derived his title from Humphrys, as follows: By three conveyances on sale dated June 28, 1893, August 9, 1893, and January 18, 1895, Humphrys conveyed three adjacent plots forming Whiteacre to James, subject to the restrictive covenants in the conveyance of August 11, 1876 (which James did not expressly covenant to observe).

By a conveyance on sale dated March 21, 1927, James' widow and the trustees of his will conveyed Whiteacre to the defendant subject to certain restrictive covenants in the schedule, including a similar covenant as to the minimum cost of buildings to be erected. The defendant expressly covenanted to observe these restrictive covenants.

The conveyance of August 11, 1876, was not mentioned in this conveyance, but it was referred to in the Charges Register in the Land Certificate of March 22, 1927.

Whiteacre abutted on the south side of the road Melbury Gardens and on the west side of Durham Road, which was also sewered.

The defendant proposed to erect seventeen houses on Whiteacre and deposited plans showing a system of drainage by one combined drain.

On April 23, 1927, the Wimbledon Corporation in pursuance of their powers under the Wimbledon Corporation Act, 1914, s. 81 (1), sanctioned this system, and declared that for the purposes of the Public Health Acts the combined drain should be deemed to be a drain and not a sewer. The defendant then erected the seventeen houses at prices in each case exceeding the minimum prescribed cost, and in April, 1927, on his request and at his expense the Wimbledon Corporation connected the combined drain with the sewer under s. 84.

On June 29, 1927, the plaintiff commenced this action, alleging that the defendant had broken the restrictive

(1) The Wimbledon Corporation Act, 1914, provides as follows:—

Sect. 81, sub-s. 1: "If it appears to the Corporation that two or more houses may be drained more economically or advantageously in combination than separately, and a sewer of sufficient size already exists or is about to be constructed within 100 feet of any part of the premises, the Corporation may, when the drains of such houses are first laid, order that such houses be drained by a combined drain to be constructed either by the Corporation if they so decide or by the owners in such manner as the Corporation shall direct, and the costs and expenses of such combined drain and the repair and maintenance thereof shall be apportioned between the owners of such houses in such manner as the Corporation shall determine, and if such drain is constructed by the Corporation such costs and expenses may be recovered by the Corporation from such owners."

Sub-s. 2: "Any combined drain constructed in pursuance of this section shall for the purposes of the Public Health Acts be deemed to be a drain and not a sewer."

Sub-s. 3: "Provided that the Corporation shall not exercise the powers conferred by this section in respect of any house, plans for the drainage of which shall have been previously approved by the Corporation."

Sect. 83: "The Corporation may on the application and at the expense of any person owning or occupying premises abutting or fronting on any street not repairable by the inhabitants at large, wherein a sewer has been laid, lay down, take up, alter, relay, or renew in, across, or along such street such drains as may be requisite or proper for connecting such premises with the sewer, doing as little damage as may be in the execution of the powers hereby granted, and making compensation for any damage which may be done in the execution of such powers, such compensation to be ascertained by and recovered before a court of summary jurisdiction."

Sect. 84: "If the owner or occupier of any premises desires that the sewer or drain from such premises shall be made to communicate with any sewer of the Corporation, such communication shall be made by the Corporation upon the cost or estimated cost of making the communication being paid to the Corporation, or the payment thereof to them being secured to their satisfaction, and the Corporation may execute all works necessary for that purpose."

ASTBURY J. 1928 GRANT v. DERWENT.

covenant as to the cost of the houses erected, and claiming a mandatory injunction and damages. He also claimed damages for trespass on his subsoil in Melbury Road by connecting the combined drain with the sewer.

The defendant took the point that the plaintiff was not a direct covenantee, and in the absence of a building scheme, which was not pleaded, was not entitled to enforce the covenant. Even if he were so entitled the covenant had not been broken. The so-called trespass on the plaintiff's subsoil was a lawful act done by the Wimbledon Corporation under their statutory powers, and the plaintiff had in fact suffered no damage therefrom.

Naldrett K.C. and *G. D. Johnston* for the plaintiff stated the facts.

Archer K.C. and *Randolph Glen* for the defendant. The plaintiff has no direct covenant from the defendant, and in the absence of a building scheme, which is not pleaded, he cannot enforce the 1876 covenants: *Elliston* v. *Reacher*. (1) There was no building scheme in 1876, though there was something like one in 1852. The plaintiff must amend his pleadings and state what he really relies on.

Naldrett K.C. and *G. D. Johnston* for the plaintiff. It is no use amending, as having regard to the decision of Romer J. in *Knight* v. *Simmonds* (2) the plaintiff cannot in this Court go back beyond the sub-scheme, if any, created by the conveyance of 1876. The decision was affirmed in the Court of Appeal (3), but this point did not arise. The enforceability point must therefore be kept open for a higher Court.

If the covenant is enforceable, it must be construed according to the building costs of 1876. It was clearly meant to secure a certain type of house defined by the building costs of that date. It is not satisfied by erecting an inferior type at present day costs.

[ASTBURY J. Apart from any authority to the contrary I should hold that the covenant of 1876 clearly refers to the actual cost price at the time of erection.]

(1) [1908] 2 Ch. 374, 384. (2) [1896] 1 Ch. 653, 660, 661.
(3) [1896] 2 Ch. 294.

Then we come to the action for trespass. The combined drainage system was sanctioned under s. 81 of the Wimbledon Corporation Act, but the combined drain is not a sewer, so that its connection with the sewer cannot be justified under s. 16 of the Public Health Act, 1875. Sect. 83 of the Wimbledon Act no doubt gives the Corporation wide powers subject to making compensation.

[*Archer K.C.* Sect. 16 is obviously inapplicable, and the defendant does not rely on s. 83, as it is not quite clear when the street became repairable by the inhabitants at large within the meaning of this section. He only relies on ss. 81 and 84.]

Sect. 84 is practically a replica of s. 18 of the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), which enables an owner "entitled to cause" his drain to communicate with a sewer to call on the local authority to make the connection. Sect. 38 of the Public Health Act, 1925 (15 & 16 Geo. 5, c. 71), if adopted, replaces this section. The omission of the words "entitled to cause" this communication in s. 84 is really immaterial. Those words refer to s. 21 of the Public Health Act, 1875, which entitles an owner to cause his drains to empty into a sewer on complying with the requirements of the local authority. But the Public Health Act sections do not authorize either the owner or the local authority to trespass on private property: *Wood* v. *Ealing Tenants, Ld.* (1), and it is inconceivable that s. 84 of the Wimbledon Act was intended to create such a power.

In that case the defendants owned a private road with a sewer thereunder which was vested in the local authority. The plaintiff's property abutted on this road, and at his request the local authority connected his drain with the sewer. The defendants having removed the connecting pipe, the plaintiff sued them for damages. The defendants counterclaimed for trespass to their road. The county court judge dismissed the action and gave the defendants 30*s.* on their counterclaim. The plaintiff appealed. The Divisional Court dismissed the appeal, holding that neither the plaintiff nor the local authority

(1) [1907] 2 K. B. 390; 71 J. P. 456.

ASTBURY J. 1928 GRANT v. DERWENT.

had any right under s. 21 to place the connecting pipe in the defendants' road and consequently the defendants were entitled to remove it.

The Corporation are clearly liable to compensate the plaintiff for any damage caused by entering his subsoil: *Northam Bridge Proprietors* v. *South Stoneham Rural Council.* (1)

The sewer is no doubt vested in the Corporation under the Public Health Act, 1875, ss. 4, 13, and so is the highway under ss. 4, 149. But they are only so vested for the limited purposes of the sewer and highway authorities: *Coverdale* v. *Charlton* (2), explained in *Rolls* v. *Vestry of St. George the Martyr, Southwark* (3); *Taylor* v. *Oldham Corporation.* (4)

Archer K.C. and *Randolph Glen* for the defendant were only called upon on the trespass point. The sewer is vested in the Corporation, and they can connect drains with it by virtue of their ownership and powers under s. 21 of the Public Health Act, 1875. Sect. 84 of the Wimbledon Act merely enabled the defendant to request the exercise of those statutory powers. In exercising those powers the Corporation, not the defendant, are liable under s. 308 to compensate the plaintiff for any damage caused. The defendant has in fact indemnified them against any such claim if and when made.

As to the rights and powers of statutory undertakers or authorities in the matter of roads and sewers: see *Schweder* v. *Worthing Gas Co.* (5); *In re Dudley Corporation* (6); and *Jary* v. *Barnsley Corporation.* (7)

Naldrett K.C. in reply.

ASTBURY J. [after stating the facts relating to the covenant point and pointing out that the defendant had never covenanted to perform the covenants of 1852 or 1876 at all, but had only entered into a new set of covenants with his immediate vendors, who derived their title from the common predecessor Humphrys, continued:] A similar question arose in *Knight* v. *Simmonds* (8), in which Romer J. held in similar

(1) (1907) 71 J. P. 345.
(2) (1878) 4 Q. B. D. 104, 118.
(3) (1880) 14 Ch. D. 785, 795.
(4) (1876) 4 Ch. D. 395, 411.
(5) [1913] 1 Ch. 118.
(6) (1881) 8 Q. B. D. 86.
(7) [1907] 2 Ch. 600, 613, 619.
(8) [1896] 1 Ch. 653, 660, 661.

circumstances that the plaintiff could not sue the defendant upon the earlier covenants. The facts are practically identical, and I propose to follow Romer J.'s decision and say nothing further upon the enforceability issue, except one thing. The portion of the earlier covenants which the plaintiff desires to enforce against the defendant relates to the value or cost price of houses which may be built upon the land subject to the covenant, and the covenant, if enforceable by the plaintiff against the defendant—which I think it is not—would have prevented the defendant from erecting any dwelling-house exclusive of outbuildings at a less cost price than 800*l.*, or any pair of semi-detached villas at a less cost price than 1200*l.* The defendant has not broken this covenant, even if enforceable by the plaintiff against him. He has built seventeen houses. Each pair of semi-detached villas and each single house cost considerably over 1200*l.* and 800*l.* respectively. The covenant therefore, even if enforceable, has not been broken. Further, the covenant could only be enforced by the plaintiff if a building scheme were in operation in connection with this property. No building scheme is pleaded, and the plaintiff has not asked leave to amend. The action on the covenant therefore fails.

The second question relates to the claim for trespass by connecting the combined drain with the sewer. [His Lordship then stated the facts as to the road Melbury Gardens and its making up by the Corporation in 1926 and its formal declaration as a public road on June 9, 1927, and the Corporation's approval to the defendant's combined drainage system on April 23, 1927, and continued:] This combined system involved the minimum of interference with the road and its subsoil and sewer. When the combined drainage system was complete the defendant requested the Corporation to connect it with their sewer, and that was done. The plaintiff claims that this was a trespass on his subsoil. The defendant's property, Whiteacre, runs right up to the road Melbury Gardens, and for the purpose of connecting this combined drainage system with the Melbury Gardens sewer no private property had to be travelled over except the small portion of the subsoil

ASTBURY J. 1928 GRANT v. DERWENT.

of the road between Whiteacre and the sewer. The plaintiff says that carrying the connecting pipe through his subsoil to the sewer was either a trespass entitling him to damages against the defendant, or a matter entitling him to compensation against the Corporation.

The plaintiff has framed his action in damages against the defendant, and not in compensation against the Corporation, who are not parties. He claims damages from the defendant in respect of that so-called trespass on the ground that the defendant as owner of Whiteacre being desirous that his combined drainage system should be made to communicate with the Melbury Gardens sewer, gave notice of his desire to the Corporation. It is suggested that by thus putting the Corporation into action he became a joint tortfeasor and liable in damages. What the damages can possibly be I cannot imagine.

At the time the defendant obtained the Corporation's sanction to his combined drainage scheme this road had not in fact become a highway repairable by the inhabitants at large, the formal declaration not being made until June 9, 1927. But it is plain that long before that date the Corporation were engaged upon making up this road at the expense of the frontagers with the view of taking it over.

Under s. 13 of the Public Health Act, 1875, the sewer has at all material times been vested in the Corporation.

Sect. 16 empowers any local authority to carry any sewer into, through, or under any lands whatsoever within their district. The combined drainage system, however, is deemed to be a drain and not a sewer for the purposes of the Public Health Acts, so the Corporation could not act under s. 16.

Sect. 21, however, provides: that "The owner or occupier of any premises within the district of a local authority shall be entitled to cause his drains to empty into the sewers of that authority on condition of his giving such notice as may be required by that authority of his intention so to do, and of complying with the regulations of that authority in respect of the mode in which the communications between such drains and sewers are to be made, and subject to the control

of any person who may be appointed by that authority to superintend the making of such communications."

It seems to me that, subject to the question of the private ownership of the subsoil of this road, the defendant was entitled to cause his combined drain to empty into the appropriate Corporation sewer, which must, of course, be either the Melbury Gardens sewer or the Durham Road sewer. The borough surveyor explained that it was not practicable or advisable to attempt to drain Whiteacre into the Durham Road sewer, as sewage does not run uphill, and that the appropriate sewer was the Melbury Gardens sewer.

Sect. 18, sub-s. 1, of the Public Health Acts Amendment Act, 1890, provides that: "Where the owner or occupier of any premises is entitled to cause any sewer or drain from those premises to communicate with any sewer of the local authority, the local authority shall, if requested to do so by such owner or occupier, and upon the cost thereof being paid in advance to the local authority, themselves make the communication and execute all works necessary for that purpose." In other words, an owner entitled under s. 21 of the Public Health Act, 1875, to cause his drains to empty into the sewers of a local authority, can call upon the local authority to make the communication. The matter does not, however, rest entirely on the Public Health Acts, because the Corporation has in fact resorted to the powers of the Wimbledon Corporation Act, 1914. The combined drainage system was sanctioned under s. 81, sub-s. 1, and was deemed to be a drain and not a sewer under sub-s. 2. [His Lordship read these sub-sections.] Sub-s. 2 would seem to exclude the Corporation's power to treat the combined drain as a sewer, and make the connection under s. 16 of the Public Health Act, 1875.

The defendant does not allege that the Corporation made the connection under s. 83. [His Lordship read s. 83.] I am not sure whether at the date of actual connection the street had been taken over. I think it had not, so that in one sense the sewer at the date of the connection was in a street not at the moment repairable by the inhabitants at large,

ASTBURY J. 1928 GRANT v. DERWENT.

though the necessary steps were being taken to effect that result.

The defendant really relies upon s. 84, under which the connection was made, in addition to s. 81, under which the combined drainage scheme was sanctioned. It is important to contrast the language of s. 84 with the language of s. 18 of the Public Health Acts Amendment Act, 1890. [His Lordship read s. 84.] The plaintiff suggests that the words of s. 84, though absolute, ought not to be construed as giving the Corporation power to trespass upon land in the private ownership of another person. I will assume that is so. For instance, if the owner or occupier of any premises desired that a drain from his premises should be made to communicate with some distant and ridiculous Corporation sewer not fitted for that purpose, and the Corporation—if foolish enough to do so—chose to go through a lot of private property to make the connection, the question might arise. But in the present case the defendant's property Whiteacre abuts upon the sewer road, and the only property to be traversed by the communicating pipe is the subsoil of this public highway which, as well as the sewer, is now vested in the Corporation.

In my judgment the Corporation had full power under s. 84 (even if not, indeed, under the Public Health Acts) to make this connection. If in so doing they have exceeded their powers or, on the other hand, become liable to pay compensation, nothing in this case will affect the plaintiff's right to compensation, though, as I said with regard to the claim for damages, it is difficult to see how any money compensation could be estimated.

The only question therefore is whether the fact that the soil of the road was vested in the plaintiff prevented the Corporation having the right to exercise their powers under s. 84. Now I presume that the object of a sewer under a road is to carry sewage. It cannot very well do this unless the houses it is to drain are connected with it. As the Corporation are the owners of the sewer, and as it is their duty to attend to the health of the district and to connect the proper drains with the proper sewers, I am of opinion,

notwithstanding *Wood* v. *Ealing Tenants, Ld.* (1), that it is within the Corporation's implied authority and ownership of this sewer to make such necessary connections therewith as will enable it to act as a sewer.

The plaintiff's ownership of the soil of this road is plainly subject to the Corporation's ownership of the sewer. It is also subject to the Corporation's right to exercise such acts of ownership in the subsoil as will enable them not only to repair the sewer itself from time to time, but to make the necessary and proper connections with drains to enable it to act as a sewer.

It is really extravagant to say that the plaintiff has been damaged by any act of the defendant or the Corporation. The road is a public road. The sewer is a public sewer. All that has been done is to connect the combined drain with the sewer, the very purpose for which it exists. In my opinion s. 84 of the Wimbledon Corporation Act, 1914, expressly empowered the Corporation to make the present connection. No private property was traversed except the soil of the road itself, which soil, with the sewer running through it, is, in my opinion, subject to the rights and ownership of the Corporation.

The plaintiff relied on *Wood* v. *Ealing Tenants, Ld.* (1) At first sight that looks like an authority for the proposition that the Corporation's acts in the present case were a trespass. In that case, however, there was no formal application under s. 21 of the Public Health Act, 1875, or under s. 18 of the 1890 Act, or under any section equivalent to s. 84 of the Wimbledon Act; but the connection with the sewer was made quite independently of any statutory power. The Divisional Court held that notwithstanding the plaintiff's right in that case to have a connection made in the proper manner with the local authority's sewers he had no right to insist upon going through private property for that purpose. Darling J. said (2): "In the present case the local authority on the request of the plaintiff entered on the defendants'

(1) [1907] 2 K. B. 390; 71 J. P. 456.

(2) [1907] 2 K. B. 393; 71 J. P. 457*c*.

ASTBURY J. 1928 GRANT v. DERWENT.

land and laid a pipe in it for the purpose of connecting the plaintiff's drains with the pipe in the defendants' land which was in point of law a sewer, but which had become so not because the local authority had themselves laid it in the defendants' land and paid compensation for doing so, but by reason of the curious doctrine that if two or more buildings drain into the same pipe, it thereby becomes a sewer. The mere fact that this pipe in the defendants' land was, for this reason, a sewer, does not, in my opinion, give the plaintiff or the local authority the right to enter on the defendants' land and put a pipe in it for the purpose of connecting the plaintiff's drain with this sewer."

I find it a little difficult to understand that passage, because the question how the sewer became a sewer and when and in what circumstances it became vested in the local authority seems irrelevant. It was a sewer vested in the local authority, and Darling J. apparently thought that if it had become vested in the ordinary way the plaintiff would have had a right to drain into it on complying with the proper restrictions and provisions of s. 21.

In my opinion that case is no authority for the claim for damages in the present case, where the defendant and the Corporation have statutory authority for all that has been done, and the way it has been done.

It is not necessary to go through the various authorities dealing with the concomitant rights given to a local authority by the ownership of a street or sewer. In neither the one case nor the other is the local authority's ownership confined to the mere surface of the street or the mere sewer pipes respectively. They own the street and they own the sewer, with the necessary and proper concomitant rights of dealing with them for the purpose for which they are brought into existence.

In the present case I can see no act on the part of the defendant with regard to connecting his combined drain with the sewer that infringes any right of the plaintiff. If any right has been infringed, it has been infringed by the Corporation, not by the defendant. The mere fact that the

ASTBURY J. 1928 GRANT v. DERWENT.

defendant asked or expressed a desire to the Corporation that his combined drainage system, already approved by them and intended by them to drain into this sewer, should be connected as so intended, does not in my opinion give the plaintiff in any circumstances any right against the defendant in respect of the Corporation's acts in making the connection.

The action is misconceived on both points, and must be dismissed with costs.

Solicitors: *Vivash Robinson & Co.; Taylor, Willcocks & Co.*

G. R. A.

ROMER J. 1928 *July* 19, 20.

In re SMITH.

PUBLIC TRUSTEE *v.* ASPINALL.

[1928. S. 1702.]

Trust—Discretionary trust for maintenance—Discretion as to method of applying fund—No discretion as to amount—Application in accordance with directions of sole objects of discretionary trust—Assignable interest.

Where trustees are directed to apply at their absolute discretion the whole or any part of a fund for the benefit of A., but are obliged to apply the rest of the fund, so far as it is not applied for the benefit of A., to or for the benefit of B., A. and B. together are the sole objects of the discretionary trust and are entitled between them to have the whole fund applied to or for their benefit.

ADJOURNED SUMMONS.

The following statement of the facts is substantially taken from his Lordship's judgment:—

The testator, who died on July 30, 1905, by his will dated March 31, 1905, directed his trustees to stand possessed of one-fourth of his residuary estate upon trust during the life of the defendant Mrs. Aspinall at their absolute discretion and in such manner as they should think fit "to pay or apply the whole or any part of the annual income of such one-fourth and the investments thereof or if they shall think fit from time to time any part of the capital thereof unto or for the maintenance and personal support or benefit of the said

ROMER J. 1928 SMITH, *In re*, PUBLIC TRUSTEE *v.* ASPINALL.

Lilian Aspinall or as to the income thereof but not as to the capital for the maintenance education support or benefit of all or any one or more of the children of the said Lilian Aspinall and either themselves so to apply the same or to pay the same for that purpose to any other person or persons without seeing to the application thereof And during the period of twenty-one years from my death if the said Lilian Aspinall shall live so long to accumulate the surplus if any of such income at compound interest by investing the same and the resulting income thereof in any of the investments aforesaid by way of addition to the capital of such fund as aforesaid and so as to be subject to the same trusts as are hereby declared concerning the same and during the remainder of the life of the said Lilian Aspinall in case she shall survive the said period of twenty-one years to pay or apply such surplus income (if any) to the person or persons or for the purposes to whom and for which the same would for the time being be payable or applicable if the said Lilian Aspinall were then dead And after the death of the said Lilian Aspinall as regards both capital and income both original and accumulated In trust for the child or children of the said Lilian Aspinall who either before or after her decease shall being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or marry and if more than one in equal shares." Mrs. Aspinall has had three children, all of whom attained the age of twenty-one years, and one of whom is now dead. Mrs. Aspinall is of an age when it is quite impossible that she should have any further issue. In those circumstances Mrs. Aspinall, the two surviving children and the legal personal representatives of the child who is dead all joined in executing a mortgage dated April 13, 1923, to the defendants, the Legal and General Assurance Company, which took the form of an assignment to the assurance company of all the interests that Mrs. Aspinall and the three children took under the will in any event.

This summons was taken out by the Public Trustee (who was the sole trustee of the will of the testator) for the determination of the question whether he was bound to pay the

whole of the income of the one-fourth share of the testator's residuary estate, which was settled by the will upon trust for the benefit of Mrs. Aspinall and her children, to the defendant society, until the discharge of the mortgage, or whether he was at liberty, in his discretion (notwithstanding the notice dated February 6, 1928, given to him by the solicitors of the defendant society, to pay all income then due or to become due in respect of the share of Mrs. Aspinall under the will direct to the society as mortgagees), to apply all or any part of the income or capital of the share for the maintenance or personal support or benefit of Mrs. Aspinall.

Hunt for the plaintiff.

Sanger for Mrs. Aspinall and Cecil Affleck Herbert Aspinall, one of her children. Where there is a trust of this kind a beneficiary cannot deprive the trustees of their discretion to apply the income in accordance with the trust. No greater right can be given to the association than that which the beneficiaries possessed.

[He referred to *Green* v. *Spicer* (1); *Twopeny* v. *Peyton* (2); *In re Bullock* (3); *Younghusband* v. *Gisborne* (4); and *In re Coleman.* (5)]

Bennett K.C. and *Guest Mathews*, for the defendant Society, after drawing the attention of the Court to a transcript of the judgment of the Court of Appeal in the case of *In re Nelson* (6), were not called upon to argue.

ROMER J. [after stating the facts, continued:] The question I have to determine is whether the Legal and General Assurance Company are now entitled to call upon the trustees to pay the whole of the income to them. It will be observed from what I have said that the whole of this share is now held by the trustees upon trusts under which they are bound to apply the whole income and eventually pay over or apply the whole capital to Mrs. Aspinall and the three children or some or one of them. So far as the income is concerned they are obliged

(1) (1830) 1 Russ. & My. 395.
(2) (1840) 10 Sim. 487.
(3) (1891) 64 L. T. 736.
(4) (1844) 1 Coll. C. C. 400.
(5) (1888) 39 Ch. D. 443.
(6) Now reported post, p. 920n.

ROMER J. 1928 SMITH, *In re.* PUBLIC TRUSTEE *v.* ASPINALL.

to pay it or apply it for her benefit or to pay it or apply it for the benefit of the children. So far as regards the capital they have a discretion to pay it and to apply it for her benefit and, subject to that, they must hold it upon trust for the children. Mrs. Aspinall, the two surviving children and the respresentatives of the deceased child are between them entitled to the whole fund. In those circumstances it appears to me, notwithstanding the discretion which is reposed in the trustees, under which discretion they could select one or more of the people I have mentioned as recipients of the income, and might apply part of the capital for the benefit of Mrs. Aspinall and so take it away from the children, that the four of them, if they were all living, could come to the Court and say to the trustees: "Hand over the fund to us." It appears to me that that is in accordance with the decision of the Court of Appeal in a case of *In re Nelson* (1), of which a transcript of the judgments has been handed to me, and is in accordance with principle. What is the principle? As I understand it it is this. Where there is a trust under which trustees have a discretion as to applying the whole or part of a fund to or for the benefit of a particular person, that particular person cannot come to the trustees, and demand the fund; for the whole fund has not been given to him but only so much as the trustees think fit to let him have. But when the trustees have no discretion as to the amount of the fund to be applied, the fact that the trustees have a discretion as to the method in which the whole of the fund shall be applied for the benefit of the particular person does not prevent that particular person from coming and saying: "Hand over the fund to me." That appears to be the result of the two cases which were cited to me: *Green* v. *Spicer* (2) and *Younghusband* v. *Gisborne.* (3)

Now this third case arises. What is to happen where the trustees have a discretion whether they will apply the whole or only a portion of the fund for the benefit of one person, but are obliged to apply the rest of the fund, so far as not

(1) Now reported post, p. 920n. (2) 1 Russ. & My. 395.
(3) 1 Coll. C. C. 400.

applied for the benefit of the first named person, to or for the benefit of a second named person? There, two people together are the sole objects of the discretionary trust and, between them, are entitled to have the whole fund applied to them or for their benefit. It has been laid down by the Court of Appeal in the case to which I have referred that, in such a case as that you treat all the people put together just as though they formed one person, for whose benefit the trustees were directed to apply the whole of a particular fund. The case before the Court of Appeal was this: A testator had directed his trustees to stand possessed of one-third of his residuary estate upon trust during the lifetime of the testator's son Arthur Hector Nelson: "to apply the income thereof for the benefit of himself and his wife and child or children or of any of such persons to the exclusion of the others or other of them as my trustees shall think fit." What happened was something very similar to what happened in the case before me. Hector Nelson, his wife and the only existing child of the marriage joined together in asking the trustees to hand over the income to them, and it was held by the Court of Appeal that the trustees were obliged to comply with the request, in other words, to treat all those persons who were the only members of the class for whose benefit the income could be applied as forming together an individual for whose benefit a fund has to be applied by the trustees without any discretion as to the amount so to be applied.

I only want to add this out of respect to Mr. Sanger's argument. Where there is a trust to apply the whole or such part of a fund as trustees think fit to or for the benefit of A., and A. has assigned his interest under the trust, or become bankrupt, although his assignee or his trustee in bankruptcy stand in no better position than he does and cannot demand that the fund shall be handed to them, yet they are in a position to say to A.: "Any money which the trustees do in the exercise of their discretion pay to you, passes by the assignment or under the bankruptcy." But they cannot say that in respect of any money which the trustees have not paid

ROMER J. 1928 SMITH, *In re.* PUBLIC TRUSTEE *v.* ASPINALL.

to A. or invested in purchasing goods or other things for A., but which they apply for the benefit of A. in such a way that no money or goods ever gets into the hands of A. That depends on a perfectly different principle which in no way assists Mr. Sanger in his argument in the present case.

There will, consequently, be a declaration that, in the events which have happened, the plaintiff is bound to pay the whole of the income of the one-fourth to the defendant society during the lifetime of Mrs. Aspinall, or until the mortgage is discharged.

Solicitors: *J. D. Langton & Passmore; W. E. Rickerd; Lawrence, Graham & Co.*

NOTE.

COURT OF APPEAL. OCTOBER 15, 1918.

In re NELSON.

NORRIS *v.* NELSON.

[1916. N. 60.]

APPEAL by the defendants (the wife and daughter of the son of the testator) from a judgment of Astbury J.

The facts sufficiently appear from the following judgments of the Court (Swinfen Eady M.R., Duke L.J. and Eve J.), which are copied from the transcript of the shorthand note.

G. H. Stutfield for the appellants.
W. R. Sheldon for the trustees of the will.
Hon. Frank Russell K.C. and *C. E. Bovill* for other respondents.

SWINFEN EADY M.R. (without calling upon counsel for the respondents). This is an appeal from an order of Astbury J., and the appellants are the wife and daughter of the testator's son, Arthur Hector Nelson, the point raised by the appeal being whether the trustees are now entitled to withhold the income of one-third from certain mortgagees, who have given notice requiring payment of the income to them, and in lieu of paying it to the mortgagees, apply it for the benefit of the mortgagors, the son and his wife and daughter.

Now the testator, by his will, after the death of his wife, gave one-third of the income of his residuary estate to his trustees on trust during the lifetime of his son, Arthur Hector Nelson, "to apply the income thereof for the benefit of himself and his wife and child or children or of any of such persons to the exclusion of the others or other of them as my trustees shall

think fit." What has happened is that there is one child of the marriage who has attained twenty-one, and the son, Arthur Hector Nelson, his wife, Mrs. Nelson, and the daughter who has attained twenty-one, who are the only members of the class living, have assigned by way of mortgage all their share and interest under the will, and the mortgagees now ask to have the income paid to them. It is argued on behalf of the wife and daughter, that is to say on behalf of two of the mortgagors, that, notwithstanding their mortgage, the income ought now to be withheld from the mortgagees and applied by the trustees for their benefit. In my opinion, that contention cannot prevail. It will be observed that the assignment by way of mortgage is by all the beneficiaries collectively—the son, the wife and the daughter are the only beneficiaries in esse—and they have all assigned their shares by way of mortgage, and they are the only persons entitled to the benefit of the trust.

The question raised on this appeal is unlike the case of *In re Coleman* (1), on which counsel relied, because that was a case where the trustees had power to apply the income of the fund for the benefit of a class, or any of them, to the exclusion of the others, and one member of that class only assigned his share and then claimed that an equal aliquot part, namely, one-fourth, should be paid to his assignee. The answer to that was that he did not take an equal fourth or any other share and the trustees could have applied the whole of the income to the other members of that class. That is quite a different case from the present case, where all the members of the class have assigned their shares to the mortgagees. True it is the husband, who is one member of the class, has become bankrupt, but nothing really turns on that. The principle on which the case falls to be decided is that where there is what amounts to an absolute gift, that absolute gift cannot be fettered by prescribing a mode of enjoyment. In *Younghusband* v. *Gisborne* (2) the trust was to pay an annuity to the brother until he should attempt to charge it, and from and after such attempt the same was to be applied by the trustees or some person under their direction for or towards the personal support, clothing and maintenance of the brother and for no other purpose whatever. In that case, on the brother taking the benefit of the Insolvent Debtors Act, the suit was instituted to determine the way in which the annuity was to be dealt with, and it was held by the Vice-Chancellor that the trust was for the benefit of the annuitant and passed to the assignees, and there was only an attempt, vain and ineffectual, to prevent it from so passing. In a recent case in this Court of *Watkins* v. *Watkins* (3), Lindley L.J. referred to the case of *Younghusband* v. *Gisborne* (2), pointing out that a deed or will granting an allowance to a person for his or her maintenance and support, without more, is inalienable. He refers to *Younghusband* v. *Gisborne* (2), and then he states the reason, namely, that it is because there had been an absolute gift, which cannot be fettered by imposing a particular mode of enjoyment. In this case there is what amounts to an absolute gift between the three individuals who are of age and sui juris, and they all concur in assigning by way of mortgage their interest. Under those circumstances, I am of opinion that the income of the fund should now be paid to the assignees by way of mortgage, and, of

(1) 39 Ch. D. 443. (2) 1 Coll. C. C. 400.
(3) [1896] P. 222.

ROMER J.
1928
SMITH, *In re.* PUBLIC TRUSTEE *v.* ASPINALL.

course, such payment will enure for the benefit of the mortgagors, because it will reduce the amount of their indebtedness. I think, therefore, the judgment of Astbury J. was quite right and that the appeal fails.

DUKE L.J. I am of the same opinion. It would have been an astonishing thing to me if these three persons, who are sui juris, should have been able to defeat a mortgage, which they have made, upon such a pretext as is set up here. The trust is clearly enough, in my opinion, to bring the case within the authority of *Younghusband* v. *Gisborne* (1) and *Green* v. *Spicer* (2), and within the principle stated by Lindley L.J. I cannot see anything in the facts in this case to support this appeal.

EVE J. I agree.

Solicitors: *Lloyd, Richardson & Co.; Nisbet, Daw & Nisbet; J. Woodhouse; Lawrence, Graham & Co.*

J. L. D.

ROMER J.
1928
Feb. 24; *March* 19, 20, 21, 22, 23, 26, 27, 28, 29, 30; *May* 23.

FIRST RUSSIAN INSURANCE COMPANY (IN LIQUIDATION) *v.* LONDON AND LANCASHIRE INSURANCE COMPANY, LIMITED.

[1927. F. 335.]

Company—Reinsurance Company—Russian Company having branch office in England—Soviet decree—Confiscation—Effect on Treaties with English reinsurance Company—Frustration.

A Russian reinsurance company, which had a branch office in London, entered into treaties of reinsurance with an English reinsurance company. By virtue of a decree of the Soviet Government, which came into operation on December 1, 1918, and of certain subsequent decrees, it was declared that insurance business in Russia was the monopoly of the State. The Russian company commenced an action against the English company to recover moneys alleged to be due to them under the treaties, and the English company claimed to be entitled to set off against any sum which might be due from them to the plaintiffs such balance as might be due from the plaintiffs to the defendants under one of the treaties:—

Held, that the Russian company was not, as a result of the decrees, precluded from discharging its obligations to the English company by a payment in London out of the assets of the Russian company outside Russia or by means of a set-off against the liabilities of the English company to the Russian company.

WITNESS ACTION.

The following statement of facts is taken from his Lordship's considered judgment:—

The plaintiffs in this action are an insurance company incorporated in accordance with the laws of Russia in the

(1) 1 Coll. C. C. 400. (2) 1 Russ. & My. 395.

year 1827. The defendants are an English company. The question that I have to determine is as to the effect of the confiscatory legislation of the Soviet Government of Russia upon certain treaties of reinsurance entered into between the two companies. By one set of treaties, referred to in the proceedings as the Outward Treaties, the defendants reinsured with the plaintiffs fire risks undertaken by the defendants. By another of the treaties, referred to as the Inward Treaty, the plaintiffs reinsured with the defendants fire risks undertaken by the plaintiffs. In the action the plaintiffs are suing upon the Outward Treaties alone. The Inward Treaty is the subject-matter of a counterclaim by the defendants. For the present, therefore, I will confine my attention to the Outward Treaties. These treaties are three in number, all dated February 5, 1907, and made between the defendants of the one part and the plaintiffs of the other part. They are known as "The Home Treaty," "The General Foreign Treaty," and "The Australian Treaty" respectively, according to the locality of the risks that were being thereby reinsured. But they are substantially in the same terms, and it is sufficient for the present purpose to refer to the Home Treaty alone. By that treaty the defendants agreed to reinsure with the plaintiffs, and the plaintiffs agreed obligatorily to accept, a specified proportion of the risks undertaken by the defendants within the limits of the United Kingdom, including the Isle of Man and the Channel Islands. "Bordereaux" were to be forwarded by the defendants to the plaintiffs showing the risks from time to time ceded under the treaty, together with the amount of the premiums due to the plaintiffs, which were to be a pro rata share of the net premiums received by the defendants from the insured. It was also provided that the defendants should give to the plaintiffs early intimation of any losses occurring under any policies, and that, after the defendants should have made any payment in respect of any loss, the plaintiffs should reimburse the proper proportion to the defendants without delay and at latest within ten days after application, unless such reimbursement amounted to less than 100*l.*, when the same should be carried into the

ROMER J.
1928
FIRST RUSSIAN INSURANCE CO. v. LONDON AND LANCASHIRE INSURANCE CO.

current account between the parties. It was further provided that the plaintiffs should allow to the defendants a specified commission upon the net premiums payable to them by the defendants and upon the net profits accruing to the plaintiffs under the treaty, such profits to be ascertained in manner set forth in the treaty. Quarterly accounts were to be furnished by the defendants to the plaintiffs within four months after the respective quarter days, and the balance by whomsoever due was to be paid within two weeks after the rendering of the account. Finally it was provided that a firm then bearing the name of Hollitscher & Middleton (but subsequently known as and referred to throughout these proceedings as Middleton & Cater), of No. 15 George Street, in the City of London, were the attorneys or agents appointed by the plaintiffs to act for and represent them in respect of all communications, despatch of documents, and all formalities accruing thereunder, and that their acts and signatures to all documents relating thereto or to the treaty should be binding upon the plaintiffs. The treaty was expressed to be determinable by six months' previous notice in writing on either side. Messrs. Middleton & Cater had, in fact, already been appointed the attorneys of the plaintiffs under a power of attorney dated June 16, 1906. For the plaintiffs did not confine their reinsurance business to the defendants. They entered into Outward Treaties with at least six other British insurance companies ; and Middleton & Cater, on behalf of the plaintiffs, conducted the business in connexion with all these treaties. The power of attorney, which was in English form, though executed by the plaintiffs in Petrograd, began by stating that the plaintiffs, carrying on a branch business at their office, 15 George Street, Mansion House, London, having appointed Middleton & Cater managers of their said branch business, did thereby appoint the members of that firm the company's attorneys, and it then proceeded to give such attorneys power to effect such reinsurances as they might think proper with any companies carrying on the business of fire insurance in the United Kingdom of any risks insured by such companies and other consequential powers.

The business relations between the plaintiffs and the defendants thus constituted under the Outward Treaties pursued their normal course down to the outbreak of war, though I shall have to consider later the method in which the business was so conducted. The difficulty of communicating with Russia occasioned by the war necessitated, however, an alteration in the course of business, by virtue of which alteration losses for which the plaintiffs were liable were debited to them in account and the defendants temporarily retained all balances due to the plaintiffs. This arrangement continued until March, 1916, when the defendants resumed payments to Middleton & Cater on behalf of the plaintiffs, Middleton & Cater undertaking to hold the balances so paid to them upon trust to pay any losses for which the plaintiffs might become liable under the treaties. In March, 1918, however, the practice of retaining the balances due to the plaintiffs was resumed by the defendants. With these exceptions the business under the treaties followed its normal course from the beginning of the war down to December 31, 1919, as from which day the Outward Treaties were determined by the defendants in the circumstances now to be stated.

On February 22, 1918, the defendants had given to Middleton & Cater formal six months' notices for the termination of the Outward Treaties. Their reasons for giving these notices are stated in a covering letter which was in these terms: "It is with profound regret that in consequence of the grave situation created in Russia by recent events we are compelled to give notice for the termination of all our Russian treaties. It is possible that circumstances may so alter as to warrant our extending the notices required by the treaties, and we sincerely hope that it may not be necessary to completely terminate relations. In this eventuality we shall, of course, advise you. Formal notices enclosed herewith. You will doubtless take the necessary steps to ensure that the company learns of this notification at the earliest possible moment." The grave events referred to in this letter were no doubt the overthrow of the Kerensky Government in the month of November, 1917, and the accession to power of the

ROMER J. 1928 — FIRST RUSSIAN INSURANCE CO. v. LONDON AND LANCASHIRE INSURANCE CO.

Soviet Government. Little appears to have been known by the defendants at this time as to what that Government was doing. The notices were merely given as a precautionary measure. From that time down to August, 1918, various rumours came to the knowledge of the defendants as to the acts done or threatened by the Soviet Government in connection with insurance companies, but such rumours seemed to point to nothing worse than Government control of the companies, the defendants being advised that the Russian companies would be able to continue their work and maintain their relations with foreign companies, and that their capital would "probably" remain untouched. In these circumstances the defendants informed Middleton & Cater on August 16 that they were willing to allow the Outward Treaties to run along for the time being and pending further advices from Russia when they could "see the situation more clearly in order to come to a definite and final decision." This proposal was accepted by Middleton & Cater on behalf of the plaintiffs on August 19, and the treaties remained on foot notwithstanding the expiration a few days later of the six months' notice of February 22. It is agreed that thenceforward the treaties were determinable at will. It is clear that the defendants were anxious to maintain business relations with the plaintiffs, and were willing to continue making cessions to the plaintiffs notwithstanding the uncertainty that must have existed in their minds as to what was really being done in Russia. They no doubt considered themselves sufficiently protected by their ability to put an end to those relations at any time. On November 4, 1918, the defendants received a copy of a long letter that the Russian Insurance Company had received from Mr. Kaz, their assistant general manager in Copenhagen, dealing with the position of insurance companies in Russia. This letter clearly indicated that their position was precarious, though Mr. Kaz stated that there was "no reason to lose all hope and confidence in the Russian business because of the revolution." This was not very encouraging. The general manager of the defendants, indeed, could only find

one welcome feature in it, which was that "so far as one can tell the insurance companies have suffered less than many others." On December 30 the defendants were informed by Messrs. Fester, Fothergill & Co., who were acting on behalf of other Russian reinsurance companies with whom the defendants had relations, that all Russian insurance companies (with an immaterial exception) were to liquidate by April 1, as from which date fire insurance would "apparently" be carried on by the State under Bolshevist influence. In reply to this information the defendants' general manager stated that he was not at all surprised, as he feared things would be much worse before they were better, and that the defendants would consider the question of terminating the treaties with Messrs. Fester's principals. "It is too early yet, however," he added, "for us to formulate any definite decision, and on the whole the business is so good that we can afford to deliberate so that we may get full advantage from the placing of these treaties in such directions as may be to our reciprocal benefit." Notwithstanding this information, described by Messrs. Fester & Co. as "disturbing," the defendants refrained from terminating the Outward Treaties. Nor did they take any steps in that direction when on January 1, 1919, they received what was a substantially accurate copy of the decree of December 1, 1918, hereinafter referred to, a decree that the defendants now allege finally frustrated those treaties. On the contrary, the defendants negotiated with Middleton & Cater, and ultimately concluded an addendum to the Home Treaty dated May 12, 1919, extending the nature of the risks to be conceded. It is true that at this time the defendants had seen a letter from Mr. Dobrynin, managing director of the plaintiff company, which, after setting out fairly accurately the effect of the decree of December 1, stated that the financial position of the private insurance concerns, notwithstanding the disastrous results of the Bolshevist rule, was not at all shaken. The reason he gave for this optimistic view was "that all the assets of the private insurance concerns are placed either in real property or in gilt-edged securities guaranteed by the State, which assets

ROMER J.
1928
FIRST RUSSIAN INSURANCE CO. v. LONDON AND LANCASHIRE INSURANCE CO.

will not only resume their former value, but, as is the case with all real property and sound securities, they will in all probability increase in value as soon as order is re-established in Russia." Looking at his letter as a whole, it would appear that his optimism was solely due to his belief that the Bolshevist rule would not last for long. For in an earlier part of the letter he had referred to the fact that the Bolshevists had nationalized land, factories, and ships, which had become Government property. The truth is, I think, that the defendants were willing to run the risk of what the Soviet Government might do to the Russian insurance companies. If things improved little harm would result from a continuation of the Outward Treaties. If things did not improve, the defendants would protect themselves by bringing those treaties to an end, as they were enabled to do at any time. Things, in fact, did not improve. The defendants accordingly on December 19, 1919, addressed the following letter to Middleton & Cater: "Dear Sirs,—Referring to the correspondence we had with you in February, 1918, when formal notice for the termination of the treaties was given by us, and which was subsequently extended in the hope that the Russian situation would improve, I beg to advise you that we propose to cease ceding business to the above company under the Home, General, Foreign and Australian Treaties, after the close of the present year. That is to say, cessions on all business taking effect up to midnight of December 31 will be for account of the company, but after that date no further business will be ceded. Nearly two years have now elapsed, and in view of the impossibility of communicating with our reinsurers or gauging the financial situation, either present or future, we feel that we can no longer leave the matter in suspense. We feel sure that, when the situation as regards Russian affairs is clearer, our friends will appreciate we have been patient and that we have done all in our power to maintain the connexion up to the last moment. Please acknowledge this communication on behalf of your company." As from December 31, 1919, therefore, cessions under the Outward Treaties ceased to be made. In respect of the

cessions made up to that date the accounts rendered by the defendants show a balance of 42,421*l.* 19*s.* 11*d.* due to the plaintiffs, subject to some relatively small outstanding losses which have not yet been agreed. By an order dated May 18, 1926, it was ordered that the plaintiff company should be wound up under the provisions of the Companies (Consolidation) Act, 1908, Mr. James Tait being subsequently appointed liquidator. The plaintiffs through the liquidator thereupon demanded payment of the balance in question, but were met by a refusal based upon the contention that by virtue of the Soviet action and legislation the plaintiff company ceased to function on December 1, 1918, and that accordingly its treaties ceased to be operative from that date. In consequence of this refusal the plaintiffs issued the writ in this action on March 1, 1927.

Maugham K.C., *Archer K.C.* and *Waite* for the plaintiffs. The reinsurances by the defendant company, under the Inward Treaty, are good exclusively by Russian law. The contract was not only made in Russia but was to be performed in Russia. The reinsurance by the plaintiffs' London branch is exclusively good by English law and results in a sterling value to be discharged in the City of London. Difficulties arise, as a result of the confiscatory legislation of the Soviet Government. These decrees have been held valid by the House of Lords : see *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (1) ; *Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co.* (2)

Two questions are before the Court—namely, (1.) Can the plaintiffs recover in the English Court debts due from the defendants on the balance of the account in respect of reinsurance under the London treaties, a considerable sum being due from the defendants to the London branch of the plaintiff company ? (2.) Can the defendants set off against that liability debts alleged to be due to them in Russia under the Russian treaty ?

(1) [1925] A. C. 112. (2) [1927] A. C. 95.

ROMER J.
1928
FIRST RUSSIAN INSURANCE CO. v. LONDON AND LANCASHIRE INSURANCE CO.

The rouble value (if any) due by the plaintiffs to the defendants in Russia has been extinguished by law which the Court is bound to recognize, and the plaintiffs do not admit that anything is due from their head office to the defendants by reason of the Russian treaty. Assuming that a sum was due in roubles from the plaintiffs to the defendants under the Russian treaty, the liability no longer exists under the Russian legislation and nothing is, therefore, due by way of set-off. The rights of the plaintiffs are not taken away by the Russian legislation and they do not admit that the State has power to confiscate property beyond its boundaries. The Soviet decrees are local and intended to be local, and they are not applicable in this country: see *The Jupiter* (No. 3). (1)

The British Government will not recognize confiscatory legislation in a foreign country, quite apart from the object of the foreign legislature: *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse*. (2) The defendants cannot succeed because, having knowledge of the Russian decrees, they continued to treat the plaintiffs as liable for risks and actually entered into a further contract of insurance, recognizing the existence of the Inward Treaty and exposing the plaintiffs to risks to which they would not otherwise be liable.

The plaintiff corporation is not dissolved. In issuing these decrees it was not the intention of the Soviet Republic to do anything outside their own country. The defence is founded on set-off. To that there are at least three answers: (1.) The rouble value (if any) due from the plaintiffs in Petrograd to the defendants is one which has been extinguished by the operation of Soviet law; (2.) if for some purposes it were admitted that, although the remedy was completely gone, there might be left a right, the Soviet legislation makes it clear that the payment of the sum, i.e., the remitting of roubles from Soviet Russia to London, had become impossible and was prohibited; (3.) the Statute of Limitations had run and made it impossible to set off this alleged claim for roubles at the date on which the defence

(1) [1927] P. 122, 250. (2) [1923] 2 K. B. 630, 664.

was delivered. The set-off can only be maintained if there is an actionable debt: *Rawley* v. *Rawley* (1); see also *Ralli Brothers* v. *Compañia Naviera Sota y Aznar*. (2) The provision with regard to arbitration contained in the Inward Treaty shows that no claim could be maintained in this country as to the amount (if any) due from the plaintiffs to the defendants. It would be impossible to set off a rouble debt against a sum due in the English Courts. The liquidator will show that, if the debts (if any) due in Russia from the plaintiffs to persons claiming under the Russian Treaty are disregarded, the company is perfectly solvent: *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* (3)

Wilfrid Greene K.C., *S. L. Porter K.C.*, *Andrewes-Uthwatt* and *T. W. C. Carthew* for the defendants. The Outward Treaties were determined by the decree of December 1, 1918. Frustration takes place by operation of law at a date by reason of an event. If the events in Russia were sufficient to produce frustration the contract was at an end irrespective of the knowledge of the parties concerned: see *Hirji Mulji* v. *Cheong Yue Steamship Co.* (4); *Horlock* v. *Beal* (5); *Tamplin (F. A.) Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (6); *Metropolitan Water Board* v. *Dick, Kerr & Co.* (7); *Bank Line, Ld.* v. *Arthur Capel & Co.* (8); *Eastern Carrying Insurance Co.* v. *National Benefit Life and Property Assurance Co.* (9)

This is a claim against an English company and English assets not by way of action but by way of set-off. When the meaning of words in a translation of a foreign document has to be ascertained that is a matter for the Court and not for foreign experts: *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse*. (10) The decree contains nothing which destroys the liability of the Russian company to pay out of their assets in England the liabilities

(1) (1876) 1 Q. B. D. 460.
(2) [1920] 2 K. B. 287.
(3) [1921] 3 K. B. 532.
(4) [1926] A. C. 497.
(5) [1916] 1 A. C. 486, 511.
(6) [1916] 2 A. C. 397.
(7) [1918] A. C. 119.
(8) [1919] A. C. 435.
(9) (1919) 35 Times L. R. 292.
(10) [1923] 2 K. B. 630, 643.

ROMER J.
1928
FIRST RUSSIAN INSURANCE CO. v. LONDON AND LANCASHIRE INSURANCE CO.

of the Russian companies: *In re Milan Tramways Co.* (1); *Di Sora* v. *Phillips* (2); *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse.* (3)

The Soviet legislature is no more concerned with the question whether or not the debt continues to exist in Russia than with the question whether the company continues to exist. The Soviet legislature has taken away all its assets and all its powers.

With regard to the effect of the Statute of Limitations on these proceedings see Dicey's Conflict of Laws, 4th ed., p. 478; Williams on Bankruptcy, 13th ed., p. 152. The statute could not run, because the company is not resident in this country, but beyond the seas. The company has an agent here—not a branch: *Okura & Co.* v. *Forsbacka Jernverks Aktiebolag* (4); *Thames and Mersey Marine Insurance Co.* v. *Societa di Navigazione a Vapore del Lloyd Austriaco.* (5)

Maugham K.C. in reply. The defendants are seeking to apply the doctrine of frustration to a position which amounts to no more than this—namely, that the credit of the plaintiff company has been gravely impaired by circumstances which took place in Russia. The doctrine does not exist except where there is impossibility of performance or something which completely frustrates the object which the parties had in view.

[He referred to *Hulton (E.) & Co.* v. *Chadwick* (6); *Krell* v. *Henry.* (7)]

With regard to the defence as to the effect of Russian law —the proper law applicable to the contract is the law of Russia and that law alone: Dicey's Conflict of Laws, 4th ed., p. 611, r. 160; *Bürger* v. *New York Life Assurance Co.* (8) If the rights in Russia are taken away the debt is discharged. The liability was taken over from the private enterprises by the State. The State took over the assets and the liabilities.

(1) (1884) 25 Ch. D. 587, 591.
(2) (1863) 10 H. L. C. 624, 638.
(3) [1923] 2 K. B. 630, 643.
(4) [1914] 1 K. B. 715.
(5) (1914) 111 L. T. 97.
(6) (1918) 34 Times L. R. 230.
(7) [1903] 2 K. B. 740.
(8) (1927) 43 Times L. R. 601.

As to the effect of the Statute of Limitations, an acknowledgment under the statute can only be given by an agent who is entitled to give a promise. Under the Act, if a writ cannot reach a corporation beyond the seas which is liable to be sued in this country, that corporation is, for this purpose, not beyond the seas at all. The plaintiffs' claim is well founded and the defendants' claim to a set-off must fail.

Cur. adv. vult.

May 23. ROMER J. [after stating the facts as above set out continued :] As already stated the plaintiffs are suing under the Outward Treaties only, claiming on the footing that these treaties continued down to December 31, 1919. The defendants, on the other hand, contend that the accounts between the parties under these treaties ought to be taken on the footing that the treaties came to an end on December 1, 1918, and that in any case they are entitled to set off against any sum due to the plaintiffs under the Outward Treaties the balance that was due from the plaintiffs to the defendants on that date under the Inward Treaty. The defendants do not now contend that the plaintiffs ceased to function on December 1, 1918, by reason of their having ceased to exist. Such a contention could not be maintained since the decision of the House of Lords in *Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co.* (1) They do, however, contend (1.) that by virtue of the decree of the Soviet Government of December 1, 1918, the plaintiff company was disabled from carrying on any reinsurance business as from that date ; (2.) that the authority of Middleton & Cater was determined at that date by the same decree, or, alternatively, had been determined in October, 1917, being the expiration of a period of three years from the last power of attorney given to them by the plaintiff company ; (3.) that, by reason of the said decree and of the confiscatory acts or legislation of the Soviet Government that preceded it, the Outward Treaties came to an end on December 1, 1918, in

(1) [1927] A. C. 95.

ROMER J. 1928 FIRST RUSSIAN INSURANCE CO. v. LONDON AND LANCASHIRE INSURANCE CO.

accordance with the principles relating to "frustration of contracts." I will deal with these defences in the order in which I have stated them, postponing for the moment the defence of set-off based upon the Inward Treaty.

The first of these defences is based upon the decree of December 1, 1918, alone. That decree is in these words: "Decree of the Council of People's Commissaries. Article 904. On the organization of Insurance Business in the Russian Republic. 1. Insurance of all kinds and forms, such as insurance against fire, insurance of transport, life, against accidents, hail, epizooty, bad crops, &c., is declared to be the monopoly of the State. Note: Mutual insurance of movable property and goods by co-operative organizations is carried out on a special basis. 2. All private insurance companies and organizations (joint stock share and mutual) are subject to liquidation on the publication of the present decree; former Zemstvo (Popular Soviets') and mutual-municipal insurance organizations, operating within the boundaries of the Russian Republic, are declared to be the property of the Russian Socialist Federative Soviet Republic. 3. For the immediate organization of the insurance business and for the liquidation of the parts of the insurance establishments which have become the property of the State a Commission is created at the Supreme Council of People's Economy consisting of representatives of the Supreme Council of People's Economy, People's Commissariats of Trade and Industry of Interior, Commissariat for Insurance and Combating Fire, of Finance, Labour and State Control and of Soviet Insurance organizations (Popular Soviets' and mutual-municipal). Note: The same Commission is also entrusted with liquidating private insurance organizations all the property whereof, which will appear to be there after their liquidation, becomes the property of the Russian Socialist Federative Republic. 4. The reorganization and liquidation mentioned in the foregoing articles of the existing insurance organizations and establishments must be completed not later than April 1, 1919. 5. The Commissariat for Insurance Business and Combating Fire together with the establishments existing thereat is reorganized

into the Insurance Department of the Supreme Council of People's Economy. The task of combating fire is handed over to the Supreme Council of People's Economy. 6. All Soviet properties and enterprises are not liable to insurance. 7. Life insurance by the State Savings Banks is carried out on the former basis. 8. The present decree is carried into effect from the day of its promulgation." Experts in Russian law gave evidence before me as to the meaning and effect of this decree. On one thing they are unanimous. As from December 1, 1918, no insurance company could carry on insurance business in any part of Russia that was then subject to the jurisdiction of the Government that promulgated the decree. But Mr. Krougliakoff, who gave evidence for the defendants, went further than this. He said that the decree deprived Russian companies of the power of carrying on insurance business in any part of the world. I am unable to accept this view. A company incorporated under Russian law has, of course, such powers only as that law may give to it. But it is not doubted that, apart from the decree, the plaintiff company had, according to Russian law, power to carry on insurance business both in Russia and abroad. Now the decree provides, in effect, that, as from December 1, 1918, insurance of all kinds within the jurisdiction of the Soviet Government is the monopoly of the State. For the decree has no extra-territorial effect: see *The Jupiter* (No. 3). (1) It is indeed headed with these words: "On the organization of insurance business in the Russian Republic." It does not purport to, nor, of course, could it, affect the power of foreign companies to carry on insurance business outside the Soviet territory, though it does prevent such companies from carrying on such business inside that territory. The decree, moreover, draws no distinction between Russian companies and foreign companies, and I fail to see why it should affect them differently in this respect. The truth is that the decree was not concerning itself with the powers of Russian corporations, but with the activities within the Soviet territory of insurance companies whether Russian or foreign. I come therefore

(1) [1927] P. 250.

ROMER J.
1928
FIRST RUSSIAN INSURANCE CO. v. LONDON AND LANCASHIRE INSURANCE CO.

to the conclusion that the effect of the decree was to deprive the plaintiffs of the power of carrying on an insurance business within Soviet territory, but that it did not affect their power of carrying on that business abroad.

In these circumstances it becomes necessary to consider whether the plaintiffs were carrying on the reinsurance business under the Outward Treaties in England or in Petrograd. For, with all respect to Dr. Idelson, who holds a contrary view, the decree does, in my opinion, prohibit the plaintiffs from effecting in Russia policies of insurance on property situated outside. This, as pointed out by Mr. Krougliakoff, would involve issuing a policy in Petrograd, and would be a breach of the provisions of the decree, and this opinion of his would seem to be in accordance with the English law upon the subject: see *In re United General Commercial Insurance Corporation, Ld.* (1) The question whether the plaintiffs carried on their reinsurance business in this country is not free from difficulty, but in my opinion the answer to it must be in the affirmative. When the business was first started it would certainly seem to have been the intention of the plaintiffs to institute a branch business at 15 George Street, which was Middleton & Cater's office, and to appoint that firm managers of such branch. That appears from the power of attorney to which I have already referred. Furthermore, the reinsurance business under the Outward Treaties with the defendants and similar treaties with other ceding companies was treated in practice as a branch business. Mr. Cater stated in evidence as follows: "We carried it on independently. We ourselves were entirely responsible for the management of this business, the negotiation of the contracts, the supervision of the business and all the work incidental to the carrying out of the reinsurance business." He also stated that they never consulted the head office in Petrograd as to whether they should undertake a particular risk or deal with the business in a particular way, though they would from time to time consult the head office upon any point of great importance, as any branch

(1) [1927] 2 Ch. 51.

manager would. The "bordereaux" provided for by the treaties were sent to Middleton & Cater and were checked by them. So too were the quarterly accounts. Balances due to the plaintiffs and losses payable by the plaintiffs were respectively received and paid by Middleton & Cater. The Outward Treaties were no doubt executed by the plaintiffs in Petrograd, as were the addenda subsequently made to these treaties, with the exception of the one of May, 1919. But a reinsurance business does not consist in executing reinsurance treaties. It consists in the performance of the manifold acts for which the treaties provide, the passing to and fro of the bordereaux and the accounts, the intimation, agreement and payment of losses, the correspondence and interviews which such matters demand. All this took place in London. In *Forsikringsaktieselskabet National (of Copenhagen)* v. *Attorney-General* (1) Lord Cave observed in relation to a treaty similar to the Outward Treaties in this case: "It appears to me that there is much to be said for the view that a reinsurance treaty of the nature which I have described, when supplemented by a bordereau, is in effect a policy of insurance against loss by or incidental to fire." So far, therefore, as any policies of insurance in the present case may be deemed to have existed, they would seem to have been brought into effect in London where the bordereaux were from time to time issued. For these reasons I am of opinion that the decree of December 1, 1918, did not render illegal the continuance of the plaintiffs' business under the Outward Treaties.

The next question that has to be considered is whether Middleton & Cater had any authority to continue that business, having regard to the decree of December 1, or, alternatively, to the Russian law applicable to powers of attorney. As to the decree, it is clear that it put the plaintiff company into liquidation. But there is a conflict of views among the experts in Russian law as to the effect that this liquidation had upon the authority of the company's agents. According to Dr. Idelson, the authority of the agents

(1) [1925] A. C. 639, 642.

ROMER J.
1928
FIRST RUSSIAN INSURANCE CO. v. LONDON AND LANCASHIRE INSURANCE CO.

continued until revoked by the liquidators. Mr. Krougliakoff, on the other hand, considered that the liquidation put an end to the authority of every agent. But he seemed to base this opinion upon the principle that an agent's authority is determined by the death of his principal, or by such a change in circumstances as renders the further performance of the agent's duties impossible. Quoting apparently from a Russian text-book, he instanced the case of an agent for the management of a house or an estate, and said that the agent's authority came to an end when the house was burned down or the estate was sold. He then added this: "If a company doing insurance business undergoes a fate which is really equivalent to death—that is the effect of what the Soviet Government did—no doubt that general principle would apply. The authority of every agent would come to an end." But the fate of the plaintiff company was not equivalent to death. All that happened was that so far as Soviet territory was concerned its affairs were liquidated. I cannot help thinking that Mr. Krougliakoff's evidence is really based upon the opinion which he still holds, and is of course entitled to hold, that notwithstanding the decision of the House of Lords in the *Sedgwick, Collins* case (1) the plaintiff company has according to Russian law ceased to exist. I shall have occasion to refer to that case presently in connexion with the alternative defence based upon the power of attorney. I may, however, point out that if in the present case the authority of Middleton & Cater was determined by the decree of December 1, so must have been the authority of Collins in the case before the House of Lords. In the circumstances I propose to act upon the opinion of Dr. Idelson, and I hold that the authority of Middleton & Cater was not revoked by the decree, and, never having been revoked by the Russian liquidators, continued for all times material to the present case.

The alternative defence based upon the power of attorney is this. According to Russian law a commercial power of attorney given in Russia for the purpose of being acted upon

(1) [1927] A. C. 95.

there is only operative for three years from its date. Mr. Krougliakoff says that the same rule applies to a power of attorney given in Russia for the purpose of being acted upon abroad. Dr. Idelson, however, maintains that according to the law of Russia such a document is to be construed and takes effect according to the law of the country in which it is to be acted upon. Dr. Halpern was of the same opinion. "We have here," he said, "a contract which is given with reference to some English business which has to be performed entirely in the United Kingdom and of which no part has to be performed in Russia. In my opinion, if one applies the Russian rules of conflict of laws, the lex loci solutionis would be the proper law for the construction." Mr. Krougliakoff could find no authority in the old Russian law for such a principle. There were, he said, on the contrary numerous authorities for the opposite statement—namely, that the lex loci contractus applied in such cases. He agreed, however, that if the parties to a contract indicated an intention that it should be governed by another law, such as the law of England, such intention would be given effect to in Russian law, and that such an intention might be implied. He was then asked whether, in view of the fact that the document in question was given to an English firm to be acted on in England for the purposes of satisfying people in England that the firm had authority to act, the parties had not sufficiently indicated their intention that the English law should apply. His answer was: "It is very difficult for me to say. At any rate I would not take upon myself to say that this possibility is ruled out." This being so, there does not seem to be any serious conflict between the experts in relation to the power of attorney in the present case. Neither according to Russian law nor English law was the duration of the power limited to three years. In the *Sedgwick, Collins* case (1) Lord Sumner, in referring to a similar power of attorney given by another Russian insurance company to one Collins, said: "I do not think it is proved that by Russian law, whether pre-revolutionary or

(1) [1927] A. C. 95, 109.

ROMER J.
1928
FIRST RUSSIAN INSURANCE CO. v. LONDON AND LANCASHIRE INSURANCE CO.

post-revolutionary, he had no authority all this time to do on the company's behalf all that he ostensibly did for it, nor do I see any reason why the question of his authority to carry on in London the business established here by the company should not be determined by English law." I desire respectfully to make a similar observation with reference to the present case.

I must now consider the contention of the defendants that the Outward Treaties determined on December 1, 1918, on the principle of what is called frustration of contract. It will be convenient to see, first of all, what that principle is and then to ascertain whether it is applicable to the present case. The principle in its simplest form was enunciated by Blackburn J. in *Taylor* v. *Caldwell* (1) in these words: "Where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." But, as pointed out by Vaughan Williams L.J. in *Krell* v. *Henry* (2), the principle applies not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things going to the root of the contract and essential to its performance. In *Horlock* v. *Beal* (3) the principle was stated by Lord Atkinson to apply not only

(1) (1863) 3 B. & S. 826. (2) [1903] 2 K. B. 740, 748.
(3) [1916] 1 A. C. 486.

to contracts in their executory stage, but when they have been in part performed. It will be observed, however, that the principle so stated only applies when the performance or further performance of a contract becomes impossible, which, as pointed out by Lord Loreburn in the case last mentioned, means "impracticable in a commercial sense." In the *Tamplin Steamship* case (1) the principle was stated by Lord Loreburn as follows: "A Court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract." But he added that in applying the rule it is manifest that such a term can rarely be implied except where the discontinuance is such as to upset altogether the purpose of the contract. Lord Parker in the same case referred to the principle as being that which underlies the cases in which a contract has been held to determine upon the happening of some event which renders its performance impossible or otherwise frustrates the objects which the parties to the contract have in view. In the case of *Bank Line, Ld.* v. *Arthur Capel & Co.* (2) Lord Sumner referred to the principle as the theory of dissolution of a contract by the frustration of its commercial object, and with reference to the application of the principle to a case of delay, he said: "For the time being the performance of the contract must have become altogether impossible." A little later he said: "I think also that the doctrine is one which ought not to be extended, though to cases that really fall within the decided rule it must be applied as a matter of course even under novel circumstances."

Such being the principle I must now turn to the facts in order to see whether it is applicable to the present case.

Before entering into the Outward Treaties the defendants, as was their invariable custom in similar cases, made a careful

(1) [1916] 2 A. C. 397, 403. (2) [1919] A. C. 435, 458, 459.

ROMER J.
1928
FIRST RUSSIAN INSURANCE CO. v. LONDON AND LANCASHIRE INSURANCE CO.

analysis of the balance-sheet of the plaintiff company. Before making a contract of insurance it is, of course, important for the insured to be satisfied that the insurers will be able to meet their engagements. In ordinary circumstances the premium income of a fire insurance company will be more than sufficient to meet the losses. It may not, however, be sufficient to meet them in exceptional cases such as a conflagration. In those cases the company will have to fall back upon its capital reserves. For this reason it was of importance to the defendants to satisfy themselves as to the value of the plaintiffs' capital assets; and this they did. Now it appears that, by reason of the confiscatory legislation and proceedings of the Soviet Government, practically every investment of the plaintiff company within the jurisdiction of that Government had by December 1, 1918, been annulled, destroyed, or confiscated. I have no means of ascertaining what proportion of the plaintiffs' assets in Russia was affected by these confiscatory measures, but I may, I think, assume that it was a large one. That being so, a state of affairs had arisen by December 1, 1918, that could not have been within the contemplation of the parties in 1907. They would not, of course, be justified in assuming that the financial position of the plaintiffs would continue at all times to be as sound as it then was. The possibility of a change for the worse, even a change resulting in insolvency, cannot be deemed to have been outside their contemplation. But it ought, I think, to be presumed that they contracted in 1907 on the footing that the financial position of the company would continue unaffected by any such confiscatory proceedings as those of the Soviet Government. But did the events of 1918, culminating in the decree of December 1, 1918, render the further performance of the contract commercially impracticable? Now it is a feature of this case, not present in any other to which my attention has been called, that the contract in fact continued after the date of its alleged frustration and the commercial object of the contract was in fact attained. Risks continued to be ceded down to December 31, 1919, and all the losses under these

risks payable by the plaintiffs have in fact been paid. The defendants are in no worse a position than they would have been had the revolution in Russia of November, 1917, never taken place. But, say the defendants, it is immaterial to consider what took place after December 1, 1918. By that time events had happened putting an end to a state of affairs which both parties contemplated would continue to exist. You must therefore imply a condition bringing the contract to an end on that day. If the principle of frustration be that, whenever an event happens which could not have been in the contemplation of the parties at the date of the contract and which may or may not result in the frustration of the commercial purpose of the contract, the contract is determined, there is much to be said for the defendants' contention. But this is not the principle as I understand it. The event that determines the contract must be one that frustrates it in fact. If this be not so, I cannot understand why in *Horlock* v. *Beal* (1) the House of Lords should have troubled to consider whether the contract of service in that case determined on the detention of the ship or on the imprisonment of the crew —nor, for the matter of that, why every commercial contract was not determined upon the outbreak of the great war. Furthermore, if it be a material subject for consideration, I do not see why I am to assume that if the parties had foreseen the state of affairs that existed on December 1, 1918, they would have inserted a condition determining the treaties on that day. The plaintiff company's power of continuing the business of the Outward Treaties was unaffected. Its assets outside the jurisdiction of the Soviet Government were untouched. There were considerable assets belonging to it in the United States of America, and its premium income for 1918 under the Outward Treaties was 75,000*l*. The position might, of course, take a turn for the worse at any time. But the defendants might, in these circumstances, well choose to continue what, with reasonably good fortune, would be profitable business for them, merely safeguarding themselves by a power to determine the contract at a moment's notice

(1) [1916] 1 A. C. 486.

ROMER J. 1928 FIRST RUSSIAN INSURANCE CO. v. LONDON AND LANCASHIRE INSURANCE CO.

in preference to providing for its determination automatically on December 1, 1918. It will have been observed that this is precisely what they did in point of fact in August, 1918, and thereafter down to December, 1919. They did not know all that we know now. But they knew a good deal, as is shown by the correspondence, and I cannot help thinking that they must have suspected a good deal more. I did not, however, have the opportunity of seeing any of their directors in the witness box, though their assistant manager spoke as to his own state of knowledge. However this may be, I am not prepared to hold that the Outward Treaties were determined on December 1, 1918. In my opinion, they continued operative down to December 31, 1919. The plaintiffs are accordingly entitled to recover the balance shown due to them on taking the accounts upon that footing, subject only to the defendants' claim of set-off under the Inward Treaty. With that claim I must now deal. By the Inward Treaty which was entered into in the year 1892, it was agreed that the defendant company should reinsure a specified proportion of the risks undertaken by the plaintiffs in the parts of the Russian Empire therein mentioned in consideration of a proportionate amount of the premiums. Clause 7 provided for delivery from time to time of bordereaux to the defendants' representative, meaning no doubt the defendants' representative in Petrograd. Clause 12 provided that as soon as the amount of a loss had been established the share falling to the defendants should be notified to them as requiring payment. The same clause also provided that settlement of accounts between the two contracting parties should take place monthly in the following manner. During the first days of each month the premiums due to the defendants under the bordereaux for the past month were to be added together and the agreed commission of the plaintiffs was to be deducted from the total and the balance paid after the lapse of five months.

The losses payable for each month by the defendants were to be paid in silver roubles to the plaintiffs within the first fourteen days of the following month at St. Petersburg.

Clause 14 was in these terms : " The London and Lancashire " agrees through its appointed agents in St. Petersburg to settle all transactions having reference to this agreement such as the receipts of the bordereaux, notices of alterations, advices and settlement of losses, and acknowledgment of the monthly accounts, in fact all questions referring to this treaty. Clause 15 further emphasized the fact that the settlement of all matters under the treaty must be effected by the defendants in St. Petersburg so long as any reinsurance for which they might be liable remained in force. The treaty also contained an arbitration clause which provided that in all questions not specially mentioned in the agreement both companies declared themselves willing to submit to the principles and usages which are generally applied to reinsurance business, but that in case of any disputes arising under the agreement they were to be settled by arbitration consisting of two arbitrators and one umpire, all resident merchants of St. Petersburg. These arbitrators were charged to come to an amicable but final decision, and both parties renounced all ordinary and extraordinary legal remedies against such decision.

I cannot doubt that the proper law of this treaty, to use Professor Dicey's expression, is Russian, and that it is that law by which the parties intended the contract to be governed.

It is agreed on both sides that this treaty came to an end on December 1, 1918, by reason of the decree of that date. For as from that date the plaintiffs could effect in Soviet Russia no further insurances. Now, if this treaty had determined on that day in a normal manner, the accounts between the parties would have had to be taken as at that time with any adjustments necessitated by claims subsequently accruing under policies then current, and the balance (if any) due to the defendants ascertained. That balance would, as it seems to me, have been payable in Petrograd in roubles. It is alleged by the defendants that there was in fact such a balance, and that they are entitled to set off what is due to them in respect of such balance against the plaintiffs' claim under the Outward Treaties. It is, however, contended

ROMER J. 1928 FIRST RUSSIAN INSURANCE CO. v. LONDON AND LANCASHIRE INSURANCE CO.

by the plaintiffs that by virtue of the decrees and regulations of the Soviet Government any liability of the plaintiffs in respect of the balance has been long since extinguished. Alternatively they rely upon the Statute of Limitations.

The questions involved in the first of these contentions of the plaintiffs are difficult of solution. The experts in Russian law have given me all the assistance they can; but they are hopelessly at variance on some crucial points, and all of them look at the questions from angles of view that are unfamiliar to an English lawyer. And this is only natural. For Soviet law is a thing sui generis, bearing no sort of relation to Russian law of the pre-revolutionary period, which affords no assistance in the search for the meaning and effect of the various decrees and regulations which are thought to have a bearing upon the questions in issue. Indeed, so far as I can understand the matter, those decrees and regulations would receive in the Courts of Soviet Russia whatever construction would appear to be most in accordance with the dictates of the revolutionary conscience. In these circumstances it will, I think, be safe to proceed upon the assumption that the debts owing by the plaintiffs in Russia have not been destroyed, unless the decrees and regulations do so in express terms or by implication necessarily drawn from the language of the decrees and regulations themselves. For when once the assets in Russia of the capitalists had been nationalized or otherwise expropriated for the benefit of what are in some of the decrees called the toiling masses, there seems no reason for thinking that the revolutionary conscience would trouble itself to free the capitalists from their liabilities. Turning now to the relevant decrees and regulations, it is to be observed that the decree of December 1, 1918, does not purport in any way to deal with the liabilities of the insurance companies. It deprives them of their power of carrying on the business of insurance in Soviet Russia, and practically all their assets within the Soviet jurisdiction had been confiscated previously. What was left was put into liquidation, and all their property which would "appear to be there" after their liquidation became the property

of the Soviet Republic. Inasmuch as the payment of the companies' debts would diminish the amount of the funds in the hands of the liquidators which was to be the property of the Republic, it may safely be assumed that the liquidators would refuse to pay any debt owing to a foreign company, such as the defendants. But there was no object to be gained in relieving the insurance companies of their obligation to pay their debts out of any assets they might possess outside the Soviet jurisdiction, and the decree in no way purports to do so. The next decree to which reference must be made is that of the Council of People's Commissaries of March 4, 1919. I need not read it at length. It is sufficient for the present purpose to read clause 2, which is in these terms: "State enterprises are relieved of the obligation to pay to private persons and enterprises any debt incurred prior to the nationalization of the said enterprises, including payments in respect of debentures but excluding wages to their workers and employees. Note: The former State works transferred to the Workers' and Peasants' Government as a result of the October revolution are relieved of payment only of those debts which were incurred prior to October 25, 1917." Dr. Idelson is of opinion that this decree in no way refers to insurance companies, but to manufacturing companies only. Greer J. came, however, to the opposite conclusion in *Sea Insurance Co.* v. *Rossia Insurance Co.* (1), accepting the evidence of Mr. Krougliakoff in this respect in preference to that of Dr. Idelson. I am not sure whether Dr. Halpern regards the decree as referring to insurance companies, or merely as affording a useful analogy. But he certainly regards it as supporting in one way or another his view that the debt under the Inward Treaty has been extinguished. Mr. Krougliakoff, as I have already indicated, regards the decree as referring in one sense to insurance companies as well as manufacturing companies; but he does not agree that it relieves the insurance companies of their liabilities. He points out, and in my opinion truly, that private insurance companies are not "State enterprises,"

(1) (1923) 17 Ll. L. Rep. 316.

ROMER J.
1928
FIRST RUSSIAN INSURANCE CO. v. LONDON AND LANCASHIRE INSURANCE CO.

because private insurance companies were liquidated, and new State enterprises of insurance were set up "on the ruins of private insurance companies." But the State enterprises of insurance had no intention of taking upon themselves the obligation of meeting the liabilities incurred by the private insurance companies, and s. 2 of the decree does not, in his opinion, do more than make this clear. With this opinion I agree. It is true that the section by using the word "relieved" seems to contemplate that the obligation had been previously undertaken by the State enterprises. I cannot, however, find that in the case of the insurance companies this was so in fact, though it was so apparently in certain other cases. And even if the State had taken over the obligation to discharge the debts of the insurance companies, the plaintiffs would not have been thereby discharged of their debts to the defendants in the absence of an express provision to that effect, or under some doctrine analogous to the English doctrine of novation. Assuming, therefore, that the decree of March 4, 1919, was intended to apply to insurance companies, as to which I need not express an opinion, it did not, in my judgment, destroy the debt of the plaintiffs under the Inward Treaty.

I must now refer to certain decrees relating to financial transactions in Russia that are relied upon by the plaintiffs as putting an end to their liability to the defendants. The first one, which is dated June 16, 1917, prohibited the making of money transfers to foreign countries as well as payments of roubles to the accounts of persons or bodies abroad or to their representatives in Russia except with the consent of the Minister of Finance. By another one dated September 14, 1918, it is provided as follows: "There remains in force the prohibition for private persons, private firms and institutions and also for Government bodies to effect any settlements of accounts whatever with whomsoever abroad, even for obligations which have originated before the beginning of the war, without special permission of the credit Chancellery of the People's Commissariat of Finance." By the third one dated October 3, 1918, payment of roubles into the

accounts of persons and institutions situate abroad or their representatives in Russia were prohibited unless authorized by the same Chancellery. It is unnecessary to set out these three decrees at length. But if they be examined carefully it is clear that they were primarily intended for the purpose of supporting the rate of exchange and protecting Russian currency, and this was the view of Dr. Idelson. None of them purported to discharge persons in the position of the plaintiffs from their liability to other parties, and Mr. Krougliakoff said that they did not have the effect of doing so in Russian law. They merely prohibited the discharge of such liability in a particular way. There was nothing in them, so far as I can see, that in any way prevented the plaintiffs from discharging their liability to the defendants by a payment in London out of assets of the plaintiffs outside Russia, or by means of a set-off against the defendants' liability to them under the Outward Treaties. In any case the prohibition was not an absolute one. A payment on or after December 1, 1918, could be made even in Petrograd if the consent of the Chancellery of the People's Commissariat of Finance were obtained. And if the plaintiffs are relying upon the prohibition as discharging them from all liability it is for them to show that they applied for such a consent and were refused, or that such an application would, if made, have necessarily been refused. This they have not done.

The plaintiffs next rely upon the Introductory Law relating to the Civil Code of the Soviet Republic. So far as material it is in these terms : " Par. 1. Civil Code is carried into effect from January 1, 1923. Par. 2. No disputes over civil legal relations which relations arose prior to November 7, 1917, are accepted for consideration by judicial or other institutions of the Republic. Par. 3. Disputes as to civil legal relations which relations have arisen between November 7, 1917, and the date when the Soviet Civil Code comes into force are determined by laws which were in force when such legal relations arose. Par. 4. As far as the legal relations which were allowed by laws in force at the moment when such relations arose are not sufficiently fully determined by the

ROMER J.
1928
FIRST RUSSIAN INSURANCE CO. v. LONDON AND LANCASHIRE INSURANCE CO.

above mentioned laws, the provisions of the Soviet Civil Code are to be applied. Par. 5. Enlarging interpretation of the Civil Code of R. S. F. S. R. is permitted only in case if so required by the defence of the interests of the Workmen's and Peasants' State and of the toiling masses. Par. 6. Interpretation of provisions of the Code on the basis of laws of overthrown Governments and of practice of pre-revolutionary Courts is forbidden."

As to the meaning and effect of this Introductory Law in respect to the plaintiffs' debt under the Inward Treaty, the experts are by no means agreed. Shortly stated, the question upon which they are at issue is whether the law destroys merely the remedy or whether it also destroys the right. Dr. Idelson's view is that the right has been destroyed. But when his evidence is examined it appears that in his opinion it is only in some cases that the right is extinguished, and that in the others it is only the remedy that is taken away. When asked what the cases are in which the right is extinguished, he said: "The class of cases where the right is extinguished is the class of cases where the Soviet Government meant that the right should be abolished and the meaning or intention of the Soviet Government I have to get from other decrees." So far, therefore, as the Introductory Law is concerned, I may take it that the remedy alone is affected, and that if the right is abolished this must be due to some other decree, in which expression, as appears from other parts of his evidence, Dr. Idelson intended to include authoritative pronouncements as to the Soviet law. It is, indeed, extraordinarily difficult to understand, even in the case of such legislation as this, how the very same words can be construed as affecting the right in some cases and only the remedy in others. And prima facie, the law would seem to be dealing with the remedy only. Now I have already considered the decrees that are thought to have destroyed the right, and have given my reasons for thinking that they have not that effect. It remains, however, to consider the authoritative pronouncements as to the Soviet law that Dr. Idelson had in mind. These are two circulars issued by the People's

Commissariat of Justice of August 28, 1923, and October 16, 1924, respectively, and are admittedly authoritative pronouncements. They are somewhat lengthy documents, and I need not occupy time by reading them. Dr. Idelson says that they show that in the view of Soviet jurists every insurance agreement died in Russia when the monopoly of insurance business was declared, but that all the agreements that could be enforced abroad remained in force. As a matter of construction, however, it would seem that the circulars are not directed to fire insurances at all. In any case I can find no indication in them that in the view of the Soviet jurists such a debt as that due from the plaintiffs under the Inward Treaty had been extinguished. Mr. Krougliakoff stated that the principle of the circulars would no doubt apply to fire insurances as well as life policies; and by this I understand him to mean that the obligations of foreign fire offices outside the territory of the U. S. S. R. would be considered by Soviet jurists as remaining in force, even if their obligations within that territory should have been annulled. He pointed out, however, that although there was a specific decree annulling policies of life insurance, there never had been any specific decree annulling other contracts of insurance.

I think that I have now referred to all the decrees and regulations upon which the plaintiffs rely in support of their contention that their liability under the Inward Treaty has been extinguished, and have given my reasons for coming to the conclusion that this contention has not been made good. It only remains to deal with their defence of the Statute of Limitations.

The defendants' first answer to this is the statute 4 & 5 Anne, c. 3, s. 19. The plaintiffs, they say, were at all material times "beyond the seas." I have already decided, however, that the plaintiffs were in December, 1918, carrying on business in London by their duly authorized agents. They were, as it seems to me, at that time, and they continued thereafter to be, sufficiently resident here to enable them to be sued here by the defendants. But the defendants

ROMER J.
1928
FIRST RUSSIAN INSURANCE CO v. LONDON AND LANCASHIRE INSURANCE CO.

further contend that the letters from Mr. Dobrynin dated August 4, 1922, constitute acknowledgments of the debt sufficient to take the case out of the statute. I need not read them, as it is not denied by the plaintiffs that such letters are sufficient acknowledgments if Mr. Dobrynin had authority to make an acknowledgment of the plaintiffs' debt so as to bind them. Now Mr. Dobrynin had been the managing director and the general manager of the plaintiffs in Petrograd. As such, he would appear to have had ample authority to bind the plaintiffs unless his authority was determined by the decree of December 1, 1918. By art. 19 of the statutes of the plaintiff company the management of the company's affairs is declared to be the duty of the manager. By art. 27 the duties of the board of directors are defined as follows: "(1.) To constantly control the manager's actions, his precise execution of the board's instructions and to watch over the safety of the company's funds; (2.) To appoint and dismiss, on the manager's report, the company's staff of officials and to fix their salaries and the remuneration for their services; (3.) To establish general tables of premiums for the manager's guidance; (4.) To determine the limits of risks to be accepted by the company; (5.) To settle with what foreign insurance companies the company is to enter into transactions of reinsurance, as well as to conclude obligatory contracts with other companies; (6.) To authorize the payment of sums for losses insured; (7.) To receive the interest on the company's funds, as well as to buy, exchange or sell all kinds of stock belonging to the company; and (8.) To present to the company the yearly reports and balances and to fix the amount of sums to be distributed as dividends and assigned to increase the reserve fund, conforming to the statute." I conclude from this that though questions of general importance, such as the making of reinsurance treaties, were to be decided by the board, the general management of the plaintiffs' business, such as the adjustment of the quarterly accounts under a reinsurance treaty when made, was entrusted to the manager. That being so, Mr. Dobrynin had, in my opinion, authority

to make on behalf of the plaintiffs a promise to pay the balance shown by the accounts to be due to the defendants under the Inward Treaty. But was this authority determined by the decree of December 1, 1918? In my opinion it was not. I have already given my reasons for coming to the conclusion that the authority of Middleton & Cater was not determined by that decree, and the same reasons lead me to the conclusion that the authority of Mr. Dobrynin also continued. Dr. Idelson was asked in cross-examination the question: Whether the decree by itself interfered with or took away the powers of the plaintiffs' agents, and he answered "No." The authority to act in matters relating to the affairs of the plaintiffs in Soviet Russia could no doubt have been determined by the liquidation, but there is no evidence that it was so determined. There was, indeed, no reason why it should have been. No insurances could be effected by the plaintiffs in Soviet territory after December 1, 1918, and practically all their assets in that territory had been confiscated. The business of the liquidators was merely to collect what assets remained and hand them over to the State. For it seems quite clear that they were never intended to pay any of the plaintiff company's liabilities. In such circumstances there would be no object in determining the authority of the company's various agents, who were powerless to do anything that could prejudicially affect the company's assets in Russia.

In my opinion the defendants' claim against the plaintiffs under the Inward Treaty is a valid and subsisting claim, and whatever is due to them in respect of such claim must be set off against the sum due to the plaintiffs under the Outward Treaties. It was suggested by the plaintiffs that having regard to the arbitration clause in the Inward Treaty there will be insuperable difficulties in attempting to ascertain in this country what is the amount so to be set off. I am not greatly impressed by this. It was stated in evidence by Dr. Idelson that the clause does not oust the jurisdiction of the Court, though for the purpose of deciding any question in dispute under the treaty it would be necessary to have

ROMER J.
1928
FIRST RUSSIAN INSURANCE CO. v. LONDON AND LANCASHIRE INSURANCE CO.

expert evidence as to the principles and usages of insurance business in Russia. This is because the parties, to use the words of Dr. Idelson, "agreed not to settle their disputes in accordance with the strict law, but agreed to settle their disputes according to the principles and usages of the reinsurance business." It is, however, to be observed that these principles and usages are only brought into operation in regard to any question not specially mentioned in the treaty, and I see no reason for supposing that for the purpose of ascertaining the amount of the plaintiffs' indebtedness recourse will have to be made to such principles and usages. A difficulty might, it is true, have arisen from the fact that the books of the plaintiff company in Russia have in all probability been long since destroyed. The letter of Mr. Dobrynin, however, removes this difficulty if the defendants are willing to accept his figures. His account is not brought down to a later date than November, 1918; but it is highly improbable that any premiums would have been received after that time, or that any further losses would have been paid. Be this as it may, I cannot refuse the defendants the relief that they ask by their counterclaim merely by reason of the difficulty of ascertaining the amount due to them. It is alleged by the plaintiffs that at all material times the value of the rouble was so small that the sum due to the plaintiffs under the Outward Treaties will not be diminished appreciably by a set-off. But the question as to the rate of exchange to be applied in ascertaining the defendants' claim in sterling was not argued before me, and must be left to be dealt with on the inquiry that I propose to direct. The amount found to be due in answer to that inquiry must be set off against the sum due to the plaintiffs under the Outward Treaties, and, if the parties are not able to agree, that sum must also be ascertained by taking an account.

The plaintiffs must have their costs of the action and the defendants their costs of the counterclaim, with the usual set-off.

Solicitors: *Lawrance, Messer & Co.; Parker, Garrett & Co.*

J. L. D.

GARDNER AND COMPANY, LIMITED *v.* CONE.

MAUGHAM J.

1928

July 13, 17.

[1927. G. 2450.]

Landlord and Tenant—Sub-lease—Public House—Covenant not to assign without Consent—Consent on Condition of House becoming a tied House—Fine or Benefit in the Nature of a Fine—Breach of Covenant before Commencement of Act—Retrospective Construction—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *ss.* 144, 205, *sub-s.* 1 (*xxiii.*)—*Landlord and Tenant Act*, 1927 (17 *& 18 Geo.* 5, *c.* 36), *s.* 19, *sub-s.* 1.

Where a landlord, who is also a brewer, consents to the assignment of the lease of a free public house, but stipulates that for the remainder of the term of the lease the house shall be a tied house, such stipulation is a "fine" or benefit "in the nature of a fine" within the meaning of s. 144 of the Law of Property Act, 1925.

Sect. 19, sub-s. 1, of the Landlord and Tenant Act, 1927, does not apply to a breach of contract which had taken place before the Act came into force.

WITNESS ACTION.

The following facts are taken from the judgment :—

"This is an action in which the plaintiffs, who are brewers and landlords, claim possession of a fully licensed public house known as the Hotel de Paris, Dover, demised by an underlease dated March 21, 1919, and consequential relief. The claim is founded on an alleged breach of a covenant against assignment.

The defendants, who are Mr. Joseph Cone, the alleged assignee of the underlease, and Mr. Thomas Worsdell, who was the tenant under the underlease, by their defence set up that Worsdell was entitled to make the assignment in question; and they claim in the alternative by counterclaim for relief against the alleged forfeiture under the provisions of s. 146 of the Law of Property Act, 1925.

The facts are short and not to a great extent in dispute. The underlease was dated March 21, 1919, and was made between one Norman, the lessor, and the defendant Worsdell, and was a demise of the public house in question from March 25, 1919, for the term of twenty-one years, subject to a rent of 125*l.* In the underlease there was contained a covenant by the lessee for himself and his assignees with the

MAUGHAM J.
1928
GARDNER & Co. v. CONE.

lessor that he would not during the term sell, assign, demise, or make over the possession of the premises or any part thereof for all or any part of the term without the consent of the lessor, and then there was the usual provision for re-entry in case of breach or non-performance of the agreement. By an assignment dated January 7, 1925, made between Norman, the original lessor, and the plaintiffs, Norman assigned the reversion to the plaintiffs for all the residue of the term for which the premises in question were held under the head lease, and notice of the assignment was given to the defendant Worsdell, and as from then he paid his rent to the plaintiffs. That state of things continued till the year 1927. On May 3, 1927, a firm of surveyors and valuers, C. H. Phillips & Son, of Canterbury, wrote to the plaintiffs and offered them what they called 'a free lease' expiring in 1940, being the underlease at that time held by Worsdell, at a price of 2500*l.*; this offer was declined. Messrs. Phillips then proceeded to endeavour to arrange for an assignment of the underlease, there being in the circumstances a good reason why the defendant Worsdell wished to assign. His wife was dead and his daughter was either going to be, or had been, married, and their assistance not being open to him he wished to give up the house. On May 24, 1927, there was a letter written by Messrs. Phillips to the plaintiffs, in which Messrs. Phillips thus expressed themselves: 'Will you let us know whether, in the event of a purchaser being agreeable to be tied to you for malt liquors, you would supply him with goods at the usual free house price?' The reply, which came from Mr. Lister, the managing director of the plaintiff company, on the following day was this: 'Confidential. Dear Sir, In reply to your letter of the 24th instant, it would depend on the length of the time for which the tie is to operate and the interpretation of the term "usual free house prices." If this can be amicably arranged we would prefer for the old lease to be surrendered, and for us to grant a fresh lease for the remainder of Mr. Worsdell's term to your client on the same terms as the old.' Two days later Messrs. Phillips wrote with reference to this matter: 'We have a client in

view of this property, and have suggested a tie for five years at free house prices, i.e., 10 per cent. discount, or we should be prepared to recommend 7½ per cent. and proprietary beers at 4*s*. per dozen. Of course, it may be that at the expiration of the five years there would be no advantage in changing the beers. We shall, in due course, have to acquaint Mr. Worsdell that, by the hotel being tied for malt, his price will be curtailed by at least 1000*l*., and it may be that he will refuse to negotiate for the sale. However, we should like your views again upon our suggestion, in confidence.' Then on the following day the plaintiffs replied: 'We have your letter of the 27th, and we presume that you duly received ours of the 25th, though you do not comment on our suggestion to grant a fresh lease. Don't you think that the question of prices can be best settled at an interview? If so, we suggest that you make an appointment, and bring your client to see us, when we will endeavour to meet his views.' That brings the matter up to May 28. Now it appears that in all there were undoubtedly three interviews between Phillips on behalf of his firm on the one side and the plaintiffs, the brewers, on the other; and there has been some dispute as to the exact dates of the interviews, it being clear that two of them took place at the office of the brewery, and that the other took place at the private house of Lister. There has also been some dispute as to what precisely passed at the interviews between Lister and Phillips and as to whether the name of the suggested assignee, Cone, was mentioned at any of the interviews. On that I have had the evidence of Phillips on the one side and of Lister and Knight, the manager for the plaintiffs, on the other. I have come to the conclusion that Phillips is mistaken in saying that he mentioned the name of Cone, and I accept the view of Lister and Knight that that name was not mentioned. On the other hand, I think the dispute as to what took place in reference to the attitude that Lister was taking up is more apparent than real. I think that Phillips did suggest that as a condition of being given the licence to assign he would be able to get an advantage for the plaintiffs in the nature of

MAUGHAM J. 1928 GARDNER & Co. v. CONE.

a tie. He was desirous of getting a contribution of money from the plaintiffs, inasmuch as of course they would benefit considerably by obtaining a tie. He knew that if a tie were to be given, Worsdell would get less than the suggested consideration that Phillips was negotiating to get from Cone, but he thought that if the landlords were willing to meet Cone in the matter and to make a substantial contribution, Worsdell would also be willing to lower his price, and Cone might then be willing to enter into a covenant effecting a sort of "tie" upon agreed terms. Messrs. Phillips were of course anxious, like all agents, to get business done; and I have not any doubt that the plaintiffs were perfectly willing to negotiate on this footing. I do not think that there was anything more than mere negotiation, and accordingly I do not think that Lister ever definitely promised that if the tie were obtained the rest of the arrangement would be carried out, and a licence would be given for an assignment. It is clear that he had not completely turned it down; but on the other hand he had, as the correspondence shows, clearly indicated his preference for the alternative of a new lease, and was only negotiating with regard to the matter of the licence because he was naturally desirous of ascertaining what was going to be done, and was of course quite willing to take part in a transaction as the result of which his company would obtain the advantage of a tie in respect of this public house, which would continue till the year 1940. On June 22, 1927, Messrs. Phillips wrote again to the plaintiffs. After referring to the transaction having stopped owing to another firm having come forward and the probability of that falling through, they went on to say: 'It may be that our client will still be the applicant to you for an assignment, in which case we are recommending that he be tied for malt liquors at your ordinary trade price, less 5 per cent. It would then appear to be entirely a question of agreeing an amount with Mr. Worsdell, for capitalising the other 5 per cent. We are not exactly ready to put this offer definitely before you, but this letter is written with the idea of giving you information which may be of use.' That was acknowledged, and on

July 13, Messrs. Phillips wrote : 'Dear Sirs, We are instructed by our client Mr. Worsdell to apply to you for your licence to assign as interested in the above hotel sub-lease to Mr. Joseph Cone of 3 West Terrace, Folkestone' ; and the references are then given. This much is clear, that in the meantime Messrs. Phillips, on applying to Worsdell and presumably to Cone, both of whom were their clients, had ascertained that they were not willing to give a tie or to continue the negotiations on the footing that Phillips had himself suggested to the plaintiffs. In those circumstances Phillips conceived the idea that he was entitled to ask for a licence to assign without any consideration, and that if it was refused his client would be entitled to assign without consent at all. In my opinion, pausing here, it has not been established that the plaintiffs definitely refused to give a licence except upon the condition of the payment to them of such fine or sum of money in the nature of a fine as I am going to refer to in a moment. My impression is that they were never really asked to do so. Messrs. Phillips had suggested to them that Worsdell would be quite willing to make some such concession as I have mentioned, or to procure some such consideration from his assignee ; and negotiations having gone on in that way, when Messrs. Phillips wrote on July 13 stating that they were applying for the licence to assign, and when we get in answer from the plaintiffs a statement that having carefully considered the matter they had decided that they could not give their licence to assign the lease, I do not think the Court would be justified in drawing the inference that the plaintiffs had throughout been perfectly willing to grant a licence, or perfectly willing to grant a licence to a respectable and responsible tenant, provided he could be found. The position is therefore that subject to the points I am going to mention under the Law of Property Act, 1925, and the Landlord and Tenant Act, 1927, the plaintiffs were entitled to say, 'We are not willing to have any assignment at all.' Under the lease they were not bound at that time not to refuse their licence except on reasonable grounds. They had an absolute right to say,

MAUGHAM J. 1928 GARDNER & Co. v. CONE.

'We will not give our licence to assign' without giving any reason at all. That is what they did, and from that I do not think I can properly draw the inference that they had consented to give the licence to assign, but were stipulating for a consideration of the nature of a fine. The licence was refused on July 22, and on the following day Messrs. Phillips wrote: 'Replying to your favour of the 22nd instant, we are surprised at your statement that you have decided you cannot consent to give your licence to the assignment of the lease from Mr. Worsdell to Mr. Cone, in view of your previous intimation to our Mr. E. H. Phillips that you would be agreeable to doing so provided Mr. Worsdell would consent to sell to Mr. Cone with a tie to you whereby Mr. Cone obtained all his malt liquors from you, and further that in consideration of such a tie you were willing to pay to Mr. Worsdell a sum of 250*l*.' Now, I attribute some importance to the word 'intimation.' I think the true view of that is that Phillips had come to the conclusion that something of the sort probably would be arranged; but he does not state here, and according to my understanding of the evidence it would not be correct to state, that Lister had ever said anything which definitely pledged his firm to consent to the assignment, provided these terms which Phillips himself had suggested were ultimately agreed to; and, as we know, the negotiations came to an end because Worsdell and Cone refused to go on. Then it is said that that letter was not at the time answered. Of course I have to bear that in mind in considering the correct view of the evidence, but I am bound to say that both Lister and Knight gave their evidence quite well, and without in any way suggesting that Phillips did not truthfully believe that he was properly interpreting the state of mind of Lister on the matter, I have come to the conclusion that I must accept the evidence of Lister that he really never did promise that his company would consent to the assignment, provided only that this advantage was obtained. On September 22, 1927, the solicitors for Worsdell wrote to the plaintiffs stating their view of what had taken place, and stating that under the

circumstances Worsdell felt justified in assigning and did assign to Cone, since he considered that the consent to the assignment was being improperly withheld. That was replied to by the solicitors for the plaintiffs. The writ was issued on November 14, 1927; and some five weeks afterwards the Landlord and Tenant Act, 1927, received the Royal Assent.

Now there is one other fact which it may be of importance to mention, and that is that Cone's references were seen, and it was admitted at the hearing that his respectability and responsibility were not in question, nor his suitability to hold a licence. Accordingly, if there had been no other matter to be considered except the character and responsibility of Cone, it would undoubtedly have been unreasonable to refuse assent to an assignment. The reason given for refusing the assignment at the time when it was refused was this, that Lister had formed the opinion that the sum which was being asked from Cone was far more than the lease was worth. Worsdell apparently had not been a very satisfactory tenant. He had been prosecuted for selling smuggled goods; he had paid nothing for the lease when he went in, and Lister conceived that if Cone, against whom, as I have said, no one has suggested anything, was made to pay 2000*l.* or more for an assignment of the lease, he would be crippled with regard to his finances and his capacity to carry on in a satisfactory way."

Sir Thomas Hughes K.C. and *Wilfred Hunt* for the plaintiffs. The question to be considered here is, under what circumstances a tenant can obtain relief from forfeiture for assigning or underletting premises without licence under s. 146 of the Law of Property Act, 1925. Sect. 144 of the Law of Property Act, 1925, applies to leases existing at the date when the Act came into force, having regard to the first words, "In all leases," and having regard to s. 154. Sect. 144 is a reproduction of s. 3 of the Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13). The definition of a "fine" is in s. 205, sub-s. 1 (xxiii.). The lessors cannot under s. 144

MAUGHAM J. 1928 GARDNER & Co. v. CONE.

demand a sum of money in the nature of a fine for their consent, but even if they did, the lessees could not then proceed to assign without such assent. The question is whether the plaintiffs only agreed to an assignment on condition that the premises should in future be a tied house, and, if they did, whether that stipulation was in the nature of a fine within s. 144. In a covenant not to assign without the consent of the landlord there must now be read, by reason of s. 19, sub-s. 1 (*a*), of the Landlord and Tenant Act, 1927, a proviso to the effect that the landlord's consent is not to be withheld unreasonably, but as that Act did not come into operation till March 25, 1928 (see s. 26, sub-s. 2), and the forfeiture took place in July, 1927, it cannot be applicable. Under s. 146 of the Law of Property Act, 1925, the Court can give relief, but the nature of the relief is uncertain. The plaintiffs in this case gave notice to both the defendants, in which they said that the covenant had been broken, and that the breach was incapable of remedy otherwise than by re-entry or forfeiture. In *Metropolitan Water Board* v. *Solomon* (1) Joyce J. said that notwithstanding a covenant not to assign without consent, an assignment without consent would be perfectly valid to pass the term, but the reversioners might, if they chose to do so, re-enter and avoid the lease as from the time of re-entry.

Alexander Grant K.C. and *J. G. Joseph* for the defendants. There has been no forfeiture, because the defendant Worsdell only assigned after the plaintiffs had made their consent a matter of bargaining. The words, "In all leases" at the commencement of s. 19 of the Landlord and Tenant Act, 1927, make it clear that that section is retrospective: see judgment of Jessel M.R. in *Quilter* v. *Mapleson*. (2) The Court always leans against a forfeiture. If a lessor refuses to give consent to an assignment except upon payment of a fine or a benefit in the nature of a fine, the lessee can make a valid assignment without such consent: *West* v. *Gwynne* (3);

(1) [1908] 2 Ch. 214, 219. (2) (1882) 9 Q. B. D. 672, 674, 675.
(3) [1911] 2 Ch. 1.

Andrew v. *Bridgman*. (1) The word "fine" has a very wide meaning in s. 205, sub-s. 1 (xxiii.), of the Law of Property Act, 1925, and a stipulation that a public house should become a tied house would clearly be a benefit in the nature of a fine within the meaning of s. 144. A fine does not necessarily mean money: *Waite* v. *Jennings*. (2) Apart from the Landlord and Tenant Act, 1927, a landlord is free to say that he will not consent to an assignment, but if once he discusses or bargains about giving his consent he comes under that Act. If the Court is against the defendants on both points, then they ask for relief. The Court always gives relief where it can, and if there were a question of assignment now, i.e., since the coming into force of the Landlord and Tenant Act, 1927, the defendant Worsdell would get leave to assign as a matter of course.

Sir Thomas Hughes K.C. in reply. Acts of Parliament are not retrospective, unless it is distinctly so stated: *Gardner* v. *Lucas* (3), where the subject is dealt with by Lord Blackburn. Bowen L.J. takes the same view in *Reid* v. *Reid* (4), and Lindley L.J. in *Lauri* v. *Renad*. (5) Sect. 19 of the Landlord and Tenant Act, 1927, is to a certain extent retrospective, but the words "shall be deemed" in sub-s. 1 must mean as from the "passing of this Act." The rule is that if an action is pending when an Act is passed, the Act does not affect it: *Hitchcock* v. *Way* (6); *Moon* v. *Durden*. (7) The rights of the parties must be ascertained as at the date of the writ. With regard to s. 144 of the Law of Property Act, 1925, Lord Russell of Killowen C.J. deals with s. 3 of the Conveyancing and Law of Property Act, 1892, in *In re Cosh's Contract* (8), and what he says there applies to s. 144. The onus lies on the defendants to bring themselves within that section.

MAUGHAM J. [after stating the facts:] Now I think I have stated all the facts that I need state, and can proceed

(1) [1907] 2 K. B. 494; [1908] 1 K. B. 596.
(2) [1906] 2 K. B. 11.
(3) (1878) 3 App. Cas. 582, 603.
(4) (1886) 31 Ch. D. 402, 408, 409.
(5) [1892] 3 Ch. 402, 420, 421.
(6) (1837) 6 Ad. & E. 943.
(7) (1848) 2 Ex. 22.
(8) [1897] 1 Ch. 9, 13, 14.

MAUGHAM J. 1928 GARDNER & CO. v. CONE.

to consider the law as applicable to the present case. I think logically the way to consider the matter is to consider whether there was a breach of contract at the date when the assignment was executed by Worsdell and Cone. I have not seen the assignment, and I do not know the date of it; but I know from the evidence that the public house licence was transferred on August 12, 1927, and presumably the assignment of the underlease took place a short time before. I have already stated that the underlease contains a provision against the assignment, underletting, or parting with possession, but, of course, it has to be read in conjunction with s. 144 of the Law of Property Act, 1925, which replaces s. 3 of the Conveyancing Act, 1892, and is in these terms: "In all leases containing a covenant, condition, or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition, or agreement shall, unless the lease contains an express provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent; but this proviso does not preclude the right to require the payment of a reasonable sum in respect of any legal or other expense incurred in relation to such licence or consent." I have therefore to construe the existing lease for the purpose of this case as if it contained a proviso to that effect. Now there is a definition clause, s. 205, sub-s. 1 (xxiii.), under which "fine" is expressed to be a word which includes "a premium or foregift and any payment, consideration, or benefit in the nature of a fine, premium, or foregift." On the whole, though with some little doubt, I think the view taken by the Courts in cases of this kind justifies me in coming to the conclusion that a wide meaning should be given to the word "fine," and that in this case it includes the benefit conferred by a stipulation for the giving of a tie in the case of a public house. But I do not, having regard to my finding of fact, come to the conclusion that the conduct or action of the plaintiffs was such as to enable the defendants to say that

there has been a refusal by the plaintiffs to consent to the assignment, except upon terms of payment of the fine, including in that term for the present purpose the giving of the tie with regard to the public house. It is true that in the case of *West* v. *Gwynne* (1), the Court of Appeal, following a previous decision of Cozens-Hardy M.R., approving the decision of Joyce J., definitely came to the conclusion that the refusal by the lessor to give his consent to an assignment, except upon payment of a fine, relieved the lessee from the necessity of obtaining the lessor's consent, and enabled him to ignore the restriction on assignment contained in the lease. But, bearing the decision in mind and doing the best I can to see how far s. 144 of the Act of 1925 justifies the Court in coming to the conclusion that in a particular case the assignment may be made without consent, my conclusion is that (under the law as it stood till quite recently) the right to assign without consent in such a case is a right which can only exist when there has been something in the nature of a definite refusal by the lessor to give his consent except on payment of a fine, that is, where the Court can be satisfied that he is merely asking for money as a condition of granting a licence which he otherwise would not have refused. Accordingly, I hold that there was at the date when the assignment without licence was executed in this case a breach of the covenant in the lease which justified, or, subject to the point I am next going to mention, would have justified, the plaintiffs in recovering possession by proper proceedings.

I now have to deal with the important point which has been argued as to the effect of s. 19 of the Landlord and Tenant Act, 1927. By sub-s. 1 of that section it is provided that: "In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against assigning, underletting, charging or parting with the possession of demised premises or any part thereof without licence or consent, such covenant condition or agreement shall, notwithstanding any express provision

(1) [1911] 2 Ch. 1.

MAUGHAM J. 1928 GARDNER & Co. v. CONE.

to the contrary, be deemed to be, subject—(*a*) to a proviso to the effect that such licence or consent is not to be unreasonably withheld, but this proviso does not preclude the right of the landlord to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with such licence or consent." It is argued on behalf of the defendants in the present case that that provision, being clearly retrospective to some extent, ought to be made to apply ex post facto, so that although there was at the date of the assignment by Worsdell a breach of covenant, I should now regard the lease or underlease as though this proviso had been inserted at the time; and that I should then come to the conclusion that the consent was unreasonably withheld by the landlord, with the result that the defendant should be taken as having been entitled to disregard the action of the plaintiffs, and to assign the property without their consent. It seems to me that the word " retrospective " is used in several different senses, and that this leads to a good deal of confusion. An Act may be called retrospective because it affects existing contracts as from the date of its coming into operation; and this section is an instance of that. It may be more properly described as retrospective, because it applies to actual transactions which have been completed, or to rights and remedies which have already accrued; or it may apply again to such matters as procedure and evidence; and in each of those matters retrospective legislation has a different effect. As I have already said, it is clear that this Act is, in a loose sense, retrospective so far as it alters existing contracts, because, for instance, as from the date of the Act receiving the Royal Assent there is no doubt that I have to read the Act as containing the proviso in sub-s. 1 (*a*) of s. 19. On the other hand, bearing in mind the principles applicable to the question of the construction of statutes, I have come to the conclusion that it is impossible for me to hold that that section has the effect of making something which was a breach of contract at the date when it was committed, a lawful act ex post facto. I do not think the principle can be stated more shortly or more

simply than it was by Lindley L.J. in *Lauri* v. *Renad.* (1) He says this: "It certainly requires very clear and unmistakable language in a subsequent Act of Parliament to revive or recreate an expired right. It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary." It is that second and subordinate rule that I think applies here. It is clear, as I have said, with regard to altering an existing contract, that the section has this operation. It does not necessarily follow that it has, and I hold that it ought not to be construed as having, the effect of making the section apply to a breach, or to affect the consequences of a breach which had taken place before the Act received the Royal Assent. It would be singular if it had, because it is apparent that the landlord, who is the lessor under a lease which contains a positive provision against assignment, was not bound before the Act to consider at all whether he had a duty to give his licence or to consent to the assignment. When the plaintiffs refused their assent to the proposed assignment to Cone, all they were bound to consider was whether they wanted to have the assignment or not, and, as I have said, it would have been very hard on them if they were to be treated now as having acted unreasonably, because they did not bear in mind the provisions of a statute which was not then on the statute book. In my judgment the section cannot be deemed to apply or to extend to breaches which have already been committed; a fortiori I think in a case where, as here, an action had already been commenced based upon the breach in question before the statute received the Royal Assent.

I come to the conclusion, therefore, that the section is not retrospective so far as affecting a breach of contract which had taken place before the Act came into force;

(1) [1892] 3 Ch. 402, 420, 421.

MAUGHAM J.
1928
GARDNER & Co. v. CONE.

and the only matter that now remains is the matter of relief.

On the whole, I have no hesitation in saying that if the matter of discretion is invoked the Court ought to grant relief, and in fact Sir Thomas Hughes did not oppose the granting of relief under s. 146, sub-s. 2, of the Law of Property Act, 1925. I have to have regard to the proceedings and the conduct of the parties. I do not think on the whole that the plaintiffs were in any way wrong. I think they were entitled to object to the assignment when they did, and were entitled to bring this action. On the other hand, I think Cone, who is the person who has to apply to the Court for relief as being the present lessee, has been misled in the matter. I do not regard his conduct as possessing any elements of impropriety, except that perhaps he took a risk in a matter in which he has been found to be wrong.

On the whole, I think the proper order is to grant relief on the terms of the payment of the costs of the action by the defendants. The question has been raised as to whether the costs should be party and party, or solicitor and client costs. I think in the circumstances of the case I am justified in saying that the costs shall be solicitor and client costs of the action; but at the same time I shall not make any other term with regard to the expenses, compensation or otherwise, which I am entitled to grant under sub-s. 2 of s. 146. I should add that I think it is reasonable that the landlords should have a copy of the assignment, and a copy of it must be given to the landlords.

Solicitors for the plaintiffs: *Kingsford, Dorman & Co., for Kingsford, Arrowsmith & Wightwick, Canterbury.*

Solicitors for the defendants: *Mowll & Mowll, for Mowll & Mowll, Dover.*

P. J. B.

END OF VOL. AND OF CHANCERY SERIES FOR 1928.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 2, 1928, will be as follows:—

In the First Series,
[1928] Ch.

In the Second Series,
[1928] 1 K. B. [1928] 2 K. B. [1928] P.

In the Third Series,
[1928] A. C.

INDEX.

ACCIDENT—Voluntary payment of compensation—Cesser on application for review and determination—Statutory duty - - - **484**
See WORKMEN'S COMPENSATION.

ACCUMULATIONS—*Infant Member of fluctuating Class—Destination of Accumulations during Minority — Conveyancing Act,* 1881 (44 & 45 *Vict. c.* 41), *s.* 43, *sub-s.* 2—*Trustee Act,* 1925 (15 *Geo.* 5, *c.* 19), *s.* 31.
In re KING. PUBLIC TRUSTEE *v.* ALDRIDGE **Romer J. 330**

—— Period—Twenty-one years from testator's death—Intervening minority period — Accumulations during minority not to be taken into account - - - - - **88**
See LAW OF PROPERTY **1.**

ADMINISTRATION—*Foreign Will—English Assets — Appointment of "heirs" under foreign Will — Attorney - Administrator — Foreign Principal—Distribution of English Assets—As to valid Receipt by "heirs"—Position of foreign Executors — Effect of Law of Domicil — Provision for foreign Debts — Issue of Advertisements in foreign Newspapers by Attorney-Administrator—Form of Order on Distribution.*
In re ACHILLOPOULOS. JOHNSON *v.* MAVROMICHALI - - - **Tomlin J. 433**

—— Legacies given out of personalty fund—Fund subject to mortgages—Direction for payment of debts out of special fund—How far personalty fund relieved - - **45**
See WILL **8.**

ADMINISTRATION—*continued.*

2. —— *Principal and Surety—Bond—Sureties—Threat to distribute Estate without providing against Liability—Action by Bondsmen against Administrator—Quia timet.*
In re ANDERSON-BERRY. HARRIS *v.* GRIFFITH - **Clauson J. and C. A. 290**

AGREEMENT—Price maintenance—Proprietary article—Validity - - **264**
See RESTRAINT OF TRADE.

—— Sale of business — Condition — Alleged failure to fulfil condition—Arbitration clause - - - - **17**
See ARBITRATION.

ALIENATION—Rule against—Gift for maintenance of grave—Validity - **464**
See WILL **2.**

ANNUITY—Bequest of trust fund subject to annuity—Interest—Date of commencement - - - - **716**
See WILL **1.**

ARBITRATION—*Agreement for Sale of Business—Subject to Condition expressed in Agreement—Submission of Disputes as to any Clause in Agreement—Staying Proceedings—Questions of Fact — Arbitration Act,* 1889 (52 & 53 *Vict. c.* 49), *s.* 4.
DE LA GARDE *v.* WORSNOP & CO. **Clauson J. 17**

ARREARS—Ordinary shares with right to limited cumulative dividend—Fund available for part payment of arrears — Mode of distribution **53**
See COMPANY **4.**

ASSIGNMENT—Policy of insurance—Subsequent extension of period of insurance by assured—Policy money becoming payable in extended period—Right of assignee - - **179**
See INSURANCE **1.**

—— Trade mark—Duty of registrar to investigate title - - - **829**
See TRADE MARK **1.**

BANK—Money on deposit—Municipal savings bank—Depositor—Power to give by nomination—Validity of regulations extending maximum - **749**
See GIFT BY NOMINATION.

BANKRUPTCY—*Bargain Void as being in Violation of the Bankruptcy Laws—Mortgage Deed—Proviso for Retention of Bonus by Mortgagee—Clause giving Mortgagee an increased Benefit if Mortgagor became a Bankrupt—Bankruptcy of Mortgagor—Death of Mortgagee—Claim by personal Representatives of Mortgagee—Claim by Trustee in Bankruptcy—Payment of Interest.*

The principles laid down in *Ex parte Mackay* (1873) L. R. 8 Ch. 643 and *Ex parte Williams* (1877) 7 Ch. D. 138 followed and applied. *In re* JOHNS. WORRELL *v.* JOHNS
Tomlin J. 737

2. —— *Debt over 50l. payable by three Instalments—Judgment for two Instalments together under 50l.—Invitation to pay final overdue Instalment—Tender—Refusal—Bankruptcy Notice on Judgment Debt—Subsequent Petition on total Debt—Discretion of Court—Bankruptcy Act,* 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 5, *sub-s.* 3.

Ex parte Astrup (1879) 11 Ch. D. 303 applied. *In re* A DEBTOR. *Ex parte* LAWRENCE - **Astbury and Tomlin JJ. 665**

3. —— *Insurance Company—Third Party Risks—Accident within Terms of Policy—Claim by injured Party against Assured—Subsequent Bankruptcy of Assured—Judgment on injured Party's Claim after Assured's Bankruptcy—Claim by Trustee against Insurance Company—Chose in Action—Right vesting in Trustee in Bankruptcy—Rights of injured Party under Judgment—Purported Release by Bankrupt of Claims against Insurance Company—Estoppel.*

In re Richardson [1911] 2 K. B. 705 discussed and distinguished.

Principles laid down in *In re Harrington Motor Co.* (1927) 44 Times L. R. 58 (since reported [1928] Ch. 105), discussed and applied. HOOD'S TRUSTEES *v.* SOUTHERN UNION GENERAL INSURANCE COMPANY OF AUSTRALASIA, LD - **Tomlin J. and C. A. 793**

4. —— *Receiving Order—Petitioners' Offer to allow Dismissal of Petition on Payment of their Solicitor and Client Costs and of their Costs in other Proceedings—Solicitor and Client Costs paid—Petition dismissed—Second Petition by same Petitioners—Extortion—Receiving Order discharged—Bankruptcy Act,* 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 5, *sub-s.* 3.

In re A DEBTOR - - - **C. A. 199**

BEQUEST—Absolute gift—Gift settled—Failure of gift over - - **661**
See WILL **4.**

—— Gift of "my present lease"—Renewal of lease—Subsequent codicil confirming will - - - - **351**
See WILL **5.**

BONA VACANTIA—Lunatic—Fund in Court—Master's certificate that no next of kin—Ex gratia payments—Subsequent claim by alleged next of kin - - - - - - **385**
See LIMITATION OF ACTION **2.**

BONUS—Distribution of cash bonus on shares—Tenant for life and remainderman—Capital or income - **682**
See COMPANY **1.**

—— Retention by mortgagee—Clause giving mortgagee increased benefit if mortgagor became bankrupt—Validity
See BANKRUPTCY **1.** **737**

BURIAL—*Cemetery—Private Vault—Grant of Right of Burial—Access to Vault by Grantee—Claim to enter and perform ceremonial Rites—No absolute Interest in Grave—Easement—Public Order—Injunction—Cemeteries Clauses Act,* 1847 (10 & 11 *Vict. c.* 65), *ss.* 40, 42—*Public Health (Interments) Act,* 1879 (42 & 43 *Vict. c.* 31), *s.* 2, *sub-s.* 2.

McGough v. *Lancaster Burial Board* (1888) 21 Q. B. D. 323 applied. HOSKYNS-ABRAHALL *v.* PAIGNTON URBAN DISTRICT COUNCIL - - - - - **Eve J. 671**

CAPITAL OR INCOME—Cash bonus on shares—Tenant for life or remainderman - - - - **682**
See COMPANY **1.**

—— Land held on statutory trusts—Costs of repairs - - - - - **721**
See LAW OF PROPERTY **8.**

CASES :—

—— *Anglo-French Music Co.* v. *Nicoll* [1921] 1 Ch. 386.
Explained. COLLAROY CO., LD. *v.* GIFFARD - **Astbury J. 144**

—— *Astrup, Ex parte* (1879) 11 Ch. D. 303.
Applied. *In re* A DEBTOR
Astbury and Tomlin JJ. 665

—— *Att.-Gen.* v. *Great Northern Ry. Co.* [1916] 2 A. C. 356.
Applied. MANCHESTER CORPORATION *v.* AUDENSHAW URBAN DISTRICT COUNCIL - - **C. A. 763**

—— *Att.-Gen.* v. *Köhler* (1861) 9 H. L. C. 654.
Discussed. *In re* MASON
Romer J. 385

—— *Att.-Gen. for Ireland* v. *Lagan Navigation Co.* [1924] A. C. 877.
Applied. MANCHESTER CORPORATION *v.* AUDENSHAW URBAN DISTRICT COUNCIL - **C. A. 763**

CASES—*continued.*

—— *Baker and Selmon's Contract, In re* [1907] 1 Ch. 238.
Followed. *In re* SPENCER AND HAUSER'S CONTRACT
Tomlin J. 598

—— *Batt's Trade Marks, In re* [1898] 2 Ch. 432.
Applied. *In re* DUCKER'S TRADE MARK - - - **Tomlin J. 405**

—— *Bennett, In re* [1913] 2 Ch. 318.
Approved. *In re* WHEATER
C. A. 223

—— *Biddulph and District Agricultural Society* v. *Agricultural Wholesale Society* [1925] Ch. 769; [1927] A. C. 76.
Considered. *In re* WILTS AND SOMERSET FARMERS, LD.
Romer J. 809

—— *Birch, In re* [1909] 1 Ch. 787.
Applied. *In re* FEGAN
Tomlin J. 45

—— *Birch* v. *Cropper* (1889) 14 App. Cas. 525.
Explained. COLLAROY CO., LD. *v.* GIFFARD - **Astbury J. 144**

Bouch v. *Sproule* (1887) 12 App. Cas. 385.
Distinguished. *In re* BATES
Eve J. 682

—— *Bridge* v. *Abbot* (1791) 3 Bro. C. C. 224.
Overruled. *In re* BROOKS **C. A. 214**

—— *Cliff Contract, In re* [1927] 2 Ch. 94.
Followed. *In re* HAYWARD
Clauson J. 367

—— *Cotton* v. *Cotton* (1839) 2 Beav. 67.
Overruled. *In re* BROOKS **C. A. 214**

—— *Crawford's Trusts, In re* (1854) 2 Drew. 230.
Followed. *In re* BROOKS **C. A. 214**

—— *Dibble* v. *Wilts and Somerset Farmers, Ld.* [1923] 1 Ch. 342.
Referred to. *In re* WILTS AND SOMERSET FARMERS, LD.
Romer J. 809

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Applied. *In re* DAVIES
Astbury J. 24

—— *Drant* v. *Vause* (1842) 1 Y. & C. Ch. 580.
Applied. *In re* CALOW - **Eve J. 710**

—— *Dyson* v. *Att.-Gen.* [1912] 1 Ch. 158.
Applied. GRANT *v.* KNARESBOROUGH URBAN DISTRICT COUNCIL
Astbury J. 310

—— *Espuela Land and Cattle Co., In re* [1909] 2 Ch. 187.
Explained. COLLAROY CO., LD. *v.* GIFFARD - **Astbury J. 144**

—— *Fleetwood, In re* (1880) 15 Ch. D. 594.
Followed. *In re* BLACKWELL
Eve J. and C. A. 614

CASES—*continued.*

—— *Fraser & Chalmers, In re* [1919] 2 Ch. 114.
Explained. COLLAROY CO., LD. *v.* GIFFARD - - **Astbury J. 144**

—— *Gage, In re* - - [1898] 1 Ch. 498
Considered. *In re* CHARDON
Romer J. 464

—— *Grand Junction Waterworks Co.* v. *Hampton Urban Council* [1898] 2 Ch. 331.
Approved and followed. GRAIGOLA MERTHYR CO., LD. *v.* SWANSEA CORPORATION
Tomlin J. 31 and C. A. 235

—— *Gray, In re* [1927] 1 Ch. 242.
Distinguished. *In re* ROBINS
Tomlin J. 721

—— *Hancock* v. *Watson* [1902] A. C. 14.
Applied. *In re* MARSHALL **Eve J. 661**

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Dictum of Kekewich J. dissented from. SUNDERLAND CORPORATION *v.* GRAY - - **Clauson J. 756**

—— *Harrington Motor Co., In re* [1928] Ch. 105.
Discussed and applied. HOOD'S TRUSTEES *v.* SOUTHERN UNION GENERAL INSURANCE COMPANY OF AUSTRALASIA, LD.
Tomlin J. and C. A. 793

—— *Harrop* v. *Mayor of Ossett* [1898] 1 Ch. 525.
Approved and followed. GRAIGOLA MERTHYR CO., LD. *v.* SWANSEA CORPORATION
Tomlin J. 31 and C. A. 235

—— *Higgs' and May's Contract, In re* [1927] 2 Ch. 249.
Followed. *In re* ROBINS
Tomlin J. 721

—— *Holford, In re* [1894] 3 Ch. 30, 46.
Applied. *In re* MABER **Astbury J. 88**

—— *Holford* v. *Acton Urban Council* [1898] 2 Ch. 240.
Considered. GRAIGOLA MERTHYR CO., LD. *v.* SWANSEA CORPORATION
Tomlin J. 31

—— *Home Marine Insurance Co.* v. *Smith* [1898] 1 Q. B. 829; [1898] 2 Q. B. 351.
Applied. *In re* NATIONAL BENEFIT ASSURANCE CO., LD.
Eve J. and C. A. 74

—— *Hood* v. *Lord Barrington* (1868) L. R. 6 Eq. 218.
Applied. *In re* HOWDEN AND HYSLOP'S CONTRACT
Astbury J. 479

—— *Hotchkys, In re* (1886) 32 Ch. D. 408.
Followed. *In re* ROBINS
Tomlin J. 721

CASES—*continued.*

—— *Huxtable, In re* [1902] 2 Ch. 793.
Followed. *In re* BLACKWELL
Eve J. and C. A. 614

—— *Lassence* v. *Tierney* (1849) 1 Mac. & G. 551.
Applied. *In re* MARSHALL
Eve J. 661

—— *Leigh's Settled Estates, In re* (1926) Ch. 852.
Not followed as regards interpretation of "immediate binding trust for sale." *In re* PARKER'S SETTLED ESTATES - - **Romer J. 247**

—— *Leigh's Settled Estates, In re* (*No.* 2) [1927] 2 Ch. 13.
Not followed on interpretation of "immediate binding trust for sale." *In re* PARKER'S SETTLED ESTATES
Romer J. 247

—— *Liverpool Mortgage Insurance Co.'s Case* [1914] 2 Ch. 617, 633, 639.
Applied. *In re* HARRINGTON MOTOR CO., LD. - **Eve J. and C. A. 105**

—— *Llanelly Railway and Dock Co.* v. *London and North Western Ry. Co.* (1873) L. R. 8 Ch. 942; (1875) L. R. 7 H. L. 550.
Distinguished. CREDITON GAS CO. *v.* CREDITON URBAN DISTRICT COUNCIL - - - **C. A. 447**

—— *McGough* v. *Lancaster Burial Board* (1888) 21 Q. B. D. 323.
Applied. HOSKYNS-ABRAHALL *v.* PAIGNTON URBAN DISTRICT COUNCIL
Eve J. 671

—— *Mackay, Ex parte* (1873) L. R. 8 Ch. 643.
Applied. *In re* JOHNS
Tomlin J. 737

—— *Maclaren* v. *Stainton* (1861) 3 D. F. & J. 202.
Applied. *In re* BATES - **Eve J. 682**

—— *Moody, In re* [1895] 1 Ch. 101.
Followed. *In re* STOKES
Tomlin J. 716

—— *Municipal Council of Sydney* v. *Bull* [1909] 1 K. B. 7.
Followed. *In re* VISSER
Tomlin J. 877

—— *National Telephone Co., In re* [1914] 1 Ch. 755.
Explained. COLLAROY CO., LD. *v.* GIFFARD - - **Astbury J. 144**

—— *Niddrie and Benhar Coal Co.* v. *Dee* [1927] A. C. 299.
Applied. CATTON *v.* ASHWELL AND NESBIT, LD.
Clauson J. and C. A. 484

—— *Ocean Coal Co.* v. *Davies* [1927] A. C. 271.
Applied. CATTON *v.* ASHWELL AND NESBIT, LD.
Clauson J. and C. A. 484

CASES:—*continued.*

—— *Oceanic Steam Navigation Co.* v. *Sutherberry* (1880) 16 Ch. D. 236.
Applied. JOHNSON *v.* CLARKE
Maugham J. 847

—— *Palmer* v. *Mallet* (1887) 36 Ch. D. 411.
Distinguished. WAY *v.* BISHOP
C. A. 647

—— *Patent Agents' Institute* v. *Lockwood* [1894] A. C. 347.
Applied. TATTERSALL *v.* SLADEN
Astbury J. 318

—— *Payne, In re* [1927] 2 Ch. 1.
Distinguished. *In re* MARSHALL
Eve J. 661

—— *Richardson, In re* [1911] 2 K. B. 705.
Distinguished. *In re* HARRINGTON MOTOR CO., LD. **Eve J. and C. A. 105**

HOOD'S TRUSTEES *v.* SOUTHERN UNION GENERAL INSURANCE COMPANY OF AUSTRALASIA, LD.
Tomlin J. and C. A. 793

—— *Robertson* v. *Willmott* (1909) 25 Times L. R. 681; [1909] W. N. 155.
Distinguished. WAY *v.* BISHOP
C. A. 647

—— *Robinson, In re* [1911] 1 Ch. 502.
Considered. *In re* MASON
Romer J. 385

—— *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *Attorney-General* [1915] A. C. 654.
Applied. MANCHESTER CORPORATION *v.* AUDENSHAW URBAN DISTRICT COUNCIL
Eve J. 127 and C. A. 763

—— *Smith* v. *Colbourne* [1914] 2 Ch. 533.
Applied. JOHNSON *v.* CLARKE
Maugham J. 847

—— *Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works* [1898] 2 Ch. 613.
Approved and followed. GRAIGOLA MERTHYR CO., LD. *v.* SWANSEA CORPORATION
Tomlin J. 31 and C. A. 235

—— *Springett* v. *Jenings* (1871) L. R. 6 Ch. 333.
Distinguished. *In re* DAVIES
Astbury J. 24

—— *Thellusson* v. *Woodford* (1805) 11 Ves. 112.
Applied. *In re* VILLAR
Astbury J. 471

—— *Wakley, In re* [1920] 2 Ch. 205, 228.
Discussed. FIRST GARDEN CITY, LD. *v.* BONHAM-CARTER
Tomlin J.

—— *Ward* v. *Van der Loeff* [1924] A. C. 653.
Applied. *In re* DAVIES
Astbury J. 24

—— *Weeding* v. *Weeding* (1861) 1 J. & H. 424.
Applied. *In re* CALOW - **Eve J. 710**

CASES—*continued.*

—— *White* v. *British Empire Mutual Life Assurance Co.* (1868) L. R. 7 Eq. 394.
Distinguished. ROYAL LONDON MUTUAL INSURANCE SOCIETY, LD. *v.* BARRETT - - **Tomlin J. 411**

—— *Will* v. *United Lankat Plantations Co.* [1914] A. C. 11.
Explained. COLLAROY CO., LD. *v.* GIFFARD - - **Astbury J. 144**

—— *Williams, Ex parte* (1877) 7 Ch. D. 138.
Applied. *In re* JOHNS **Tomlin J. 737**

—— *Wood* v. *Ealing Tenants, Ld.* [1907] 2 K. B. 390.
Distinguished. GRANT *v.* DERWENT **Astbury J. 902**

CEMETERY—Bequest for maintenance of graves—Gift over on failure to maintain—Validity - - - **464**
See WILL **2.**

—— Private vault—Interest of grantee in vault - - - - - - **671**
See BURIAL.

COMPANY — *Bonus — Distribution of Cash Bonuses—Proceeds of Sale of Ships—Tenant for Life and Remainderman — Capital or Income.*
Bouch v. *Sproule* (1887) 12 App. Cas. 385 distinguished.
Maclaren v. *Stainton* (1861) 3 D. F. & J. 202 applied. *In re* BATES. MOUNTAIN *v.* BATES - - - **Eve J. 682**

2. —— *Debenture — Receiver — Appointment by Debenture Holder—Power conferred by the Debenture on the Receiver to "get in property . . . . charged" —Company's Contract for Sale of Land— Receiver's Right to sue in Company's Name.*
M. WHEELER & CO., LD. *v.* WARREN **C. A. 840**

—— —— Acknowledgment—Balance sheet in annual report stating company's indebtedness - - - - **836**
See LIMITATION OF ACTION **1.**

3. —— *Liquidation—Misfeasance of Liquidator—No wilful default—Indemnity of Liquidator — Trustee Act,* 1893 (56 *&* 57 *Vict. c.* 53), *s.* 24—*Trustee Act,* 1925 (15 *Geo.* 5, *c.* 19), *s.* 30, *sub-s.* 1; *s.* 68, *sub-s.* 17.
In re WINDSOR STEAM COAL CO. (1901), LD. - - - - - - **Maugham J. 609**

4. —— *Ordinary Shares — Limited cumulative Dividend — Arrears — Fund for Payment in Part—Mode of Distribution.*
In re Wakley [1920] 2 Ch. 205, 228 discussed. FIRST GARDEN CITY, LD. *v.* BONHAM-CARTER - - - - - - **Tomlin J. 53**

5. —— *Reinsurance Company — Russian Company having branch Office in England — Soviet Decree — Confiscation — Effect on*

COMPANY—*continued.*

Treaties with English reinsurance Company— Frustration.
FIRST RUSSIAN INSURANCE CO. (in liquidation) *v.* LONDON AND LANCASHIRE INSURANCE CO., LD. - - - **Romer J. 922**

—— Trade mark—Registration by individual—Intention to use through the company—Bona fide intention to use—Removal of mark - **405**
See TRADE MARK **2.**

6. —— *Winding up—Proof—Personal Injury caused by Negligence of Company's Servant —Company insured aginst Third Party Risks — Judgment for Damages and Costs against Company — Subsequent Liquidation of Company — Payment by Insurers to Liquidator of Damages and Costs—Claim by Person injured to Money so paid—Money available for Distribution among general Creditors in Winding Up.*
Dicta in *Liverpool Mortgage Insurance Co.'s Case* [1914] 2 Ch. 617, 633, 639 applied.
In re Richardson [1911] 2 K. B. 705 discussed and distinguished. *In re* HARRINGTON MOTOR CO., LD. *Ex parte* CHAPLIN **Eve J. and C. A. 105**

7. —— —— *Summons by Liquidator against Secretary—Extent and Limitations of Use of s.* 215 *of Companies (Consolidation) Act,* 1908 (8 *Edw.* 7, *c.* 69).
In re ETIC, LD - - **Maugham J. 861**

8. —— —— *Surplus Assets — Preference Shares—Priority as to Dividends and Capital — Right to participate — Memorandum — Articles—Construction.*
Birch v. *Cropper* (1889) 14 App. Cas. 525; *In re Espuela Land and Cattle Co.* [1909] 2 Ch. 187; *Will* v. *United Lankat Plantations Co.* [1914] A. C. 11; *In re National Telephone Co.* [1914] 1 Ch. 755; *In re Fraser and Chalmers* [1919] 2 Ch. 114; and *Anglo-French Music Co.* v. *Nicoll* [1921] 1 Ch. 386 discussed and explained. COLLAROY CO., LD. *v.* GIFFARD - - - **Astbury J. 144**

—— Winding up—Agreement between two insurance companies to divide profits and losses — Absence of stamped policies—Proof by second company rejected - - - **74**
See INSURANCE **3.**

COMPOUND SETTLEMENT—Jointure rent charge — Termination after 1925—Effect on compound settlement **371**
See SETTLED LAND **1.**

—— Trust for sale—Prior charge for portions secured by a term of years - **247**
See SETTLED LAND **3.**

CONDITION—Agreement for sale of business —Alleged failure to fulfil condition —Arbitration clause - - **17**
See ARBITRATION.

CONTRACT — *Construction — Duration — Implication that Contract not intended to be perpetual — Determination by Notice.*

Llanelly Railway and Dock Co. v. *London and North Western Ry. Co.* (1873) L. R. 8 Ch. 942 ; (1875) L. R. 7 H. L. 550 distinguished. CREDITON GAS CO. *v.* CREDITON URBAN DISTRICT COUNCIL
Russell J. 174 and C. A. 447

—— Policy of insurance—Assignment—Subsequent extension of period of insurance by assured — Policy money becoming payable in extended period—Right of assignee - **179**
See INSURANCE **1.**

—— Sale of film rights in play—Prior will of vendor bequeathing "all my rights" in the play—Completion of contract by executors—Right of legatee to purchase money - **577**
See WILL **7.**

—— Sale of land—Title—Vendors selling as "trustees for sale"—No existing trust for sale — Offer to sell as personal representatives—Vendors' right to enforce contract - **598**
See VENDOR AND PURCHASER **3.**

—— Sale of land described as subject to tenancy from year to year—Written agreement by executors with tenant giving option for lease and undertaking not to increase rent—No power to grant option - - **847**
See VENDOR AND PURCHASER **1.**

CONTRIBUTOR—Industrial and provident society—Alteration of rules—Obligation to take additional shares—Voluntary liquidation—Liability to contribute - - - - **809**
See INDUSTRIAL AND PROVIDENT SOCIETY.

CONVERSION—Specific devise—Contract for sale before will of part of land devised—Completion after testator's death—Title to proceeds of sale **710**
See WILL **10.**

CONVEYANCE—Purchase of land out of residuary personal estate—Form of conveyance - - - - **371**
See SETTLED LAND **1.**

COPYHOLDS—Entail of undivided share—Entailed interest in personalty—Statutory trusts—Absolute interest
See LAW OF PROPERTY **2.** **579**

COSTS — *Taxation — Solicitors' Charges — Mortgage—Further Charge—Investigation of Title—General Order under Solicitors' Remuneration Act,* 1881 (44 *&* 45 *Vict. c.* 44), *cl.* 2 (*a*), *Sch. I., Part I., r.* 10.

In re COWARD, CHANCE & CO.
Russell J. 379

—— Bankruptcy — Receiving order — Petitioner's offer to allow dismissal of petition on payment of solicitor and client costs—Extortion - **199**
See BANKRUPTCY **4.**

COSTS—*continued.*

—— Form of return for rating purposes—Action for declaration of invalidity —Withdrawal of defence—Right to proceed to trial and prove invalidity
See RATES. **310**

—— Quia timet action against public authority—Successful defendant—Public Authorities Protection Act—Applicability - - **31 and 235**
See WATERWORKS.

COUNTY COUNCIL — Main road through tunnel—Liability to contribute towards cost of repair - - **359**
See HIGHWAY **1.**

COVENANT—*Restrictive Covenant of* 1876—*Minimum Cost of Buildings — Buildings erected in* 1927—*Increase of building Costs—Original Minimum adhered to—Construction of Covenant.*

Sewers—Connecting Pipe—Sewer in Public Road—Soil of Road in private Ownership—Premises abutting on Road—Right to connect Drain through Subsoil—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 21 — *Public Health Acts Amendment Act,* 1890 (53 *&* 54 *Vict. c.* 59), *s.* 18 — *Wimbledon Corporation Act,* 1914 (4 *&* 5 *Geo.* 5, *c. clxiv.*), *s.* 84.

Wood v. *Ealing Tenants, Ld.* [1907] 2 K. B. 390 distinguished. GRANT *v.* DERWENT - - - - **Astbury J. 902**

—— After-acquired property—Bequest of income to covenantor for life or until any event should happen whereby his title to income would cease—Covenant inapplicable - **10**
See SETTLEMENT.

—— Lessee's covenant to insured against fire in named office "or in some other responsible insurance office to be approved by lessor"—Lessor's desire that all houses on estate should be insured in one office—Whether ground for refusal of approval - - - - **59**
See LANDLORD AND TENANT **1.**

—— Restriction on practising as solicitor in area—Acting as managing clerk
See PARTNERSHIP. **647**

—— Tenancy of public house—Covenant not to assign without consent of landlord—Consent on condition of house becoming a tied house—Fine or benefit in the nature of a fine - **955**
See LANDLORD AND TENANT **3.**

DEBENTURE—Appointment of receiver by debenture holder—Power conferred on receiver to get in property charged—Receiver's right to sue in name of company - - - **840**
See COMPANY **2.**

—— Balance sheet contained in annual report stating indebtedness under debentures—Acknowledgment - **836**
See LIMITATION OF ACTION **1.**

DEBT—Advertisement for debts—Foreign testator—English assets—Grant of administration to attorney of foreign principles—No duty to advertise abroad - - - - 433
See ADMINISTRATION 1.

—— Tender of instalment—Refusal in order to keep debt over 50*l.*—Bankruptcy petition—Discretion - - 665
See BANKRUPTCY 2.

DENTIST—*Registration — Annual retention Fee—Non-payment—Power to remove Name from Register—Dentists Act*, 1921 (11 & 12 *Geo.* 5, *c.* 21), *s.* 7.

Observations in *Patent Agents' Institute* v. *Lockwood* [1894] A. C. 347 considered and applied. TATTERSALL *v.* SLADEN
Astbury J. 318

DEVISE — Extent of devise to trustees — Undivided shares—Entirety of land vested in trustees - - - 421
See LAW OF PROPERTY 7.

—— Farms in a parish — Subsequent acquisition of new farm in parish—Devise thereof in codicil—Failure of the devise — Devolution of new farm - - - - - 24
See WILL 9.

DISCRETIONARY TRUST—Fund not applied for maintenance of A. to go to B.—Joint right of A. and B. to have fund applied as they direct — Assignable interest - - 915
See TRUST.

DOMICIL—Foreign legatee—Infant—Money in Court—Payment out on attaining majority—Majority according to law of domicil - - - - 420
See INFANT.

ELECTRICITY—*Local Authority authorized to supply—Right of Individual to supply within Area—Business not primarily that of Supply of electrical Energy to Consumers—Electric Lighting Act*, 1909 (9 *Edw.* 7, *c.* 34), *s.* 23.

CAERPHILLY URBAN DISTRICT COUNCIL *v.* GRIFFIN - - - - Russell J. 171

ESTOPPEL—Insurance against third party risks—Action by injured third party against assured—Assured's subsequent bankruptcy — Refusal of trustee in bankruptcy to take part in action—Claim by trustee against insurance company - - 793
See BANKRUPTCY 3.

EVIDENCE—Legacy—Secret trust—Verbal instructions to one of trustees—Admissibility - - - 614
See WILL 3.

EXECUTOR—*Powers—Scottish Executors—Confirmation—Resealing in England—Real and personal Estate in England—Power to sell real Estate—No separate Grant necessary—Supreme Court of Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *ss.* 168, 175.

Hood v. *Lord Barrington* (1868) L. R. 6 Eq. 218 applied. *In re* HOWDEN AND HYSLOP'S CONTRACT - - Astbury J. 479

FOREIGN STATE—Revenue laws of the State — Liability of one of its subjects—Action by sovereign of State in English Court—Jurisdiction - - - - - 877
See INTERNATIONAL LAW.

FORFEITURE—Covenant to settle after-acquired property—Bequest of income to covenantor for life or until event causing him to cease to be entitled - - - - - 10
See SETTLEMENT.

—— Lease—Breach of covenant by subletting part of demised premises—Decontrolled premises - - 517
See LANDLORD AND TENANT 2.

FRONTAGERS—Notice to sewer, pave, etc.—Omission to serve on one frontager—Effect on other frontagers 756
See LOCAL GOVERNMENT 2.

GAS—Contract for supply—Duration—No express right to determine—Determination by notice - - 447
See CONTRACT.

—— Statutory power of local authority to lay gas mains in streets—Country lane on which bungalows abut—No public right of way—Pipes laid with consent of owners - 884
See LOCAL GOVERNMENT 1.

GIFT BY NOMINATION—*War Savings Certificates — Money on Deposit at Municipal Savings Bank — Power of Depositors to nominate — Limit of Amount capable of Nomination — Regulations—Modification of Regulations — Amount nominated exceeding statutory Limit — Application of statutory Provisions without expressly naming Act—Special Act — Application of Regulations—Savings Banks Act*, 1887 (50 & 51 *Vict.* *c.* 40), *s.* 3—*War Loan (Supplemental Provisions) Act*, 1915 (5 & 6 *Geo.* 5, *c.* 93), *s.* 5—*War Loan Act*, 1918 (8 & 9 *Geo.* 5, *c.* 25), *s.* 2, *sub-s.* 4—*Birmingham Corporation Act*, 1919 (9 & 10 *Geo.* 5, *c. lxv.*), *s.* 11—*War Savings Certificates Regulations*, 1919, *regs.* 8, 28, 48 (*i*) — *Savings Banks Act*, 1920 (10 & 11 *Geo.* 5, *c.* 12), *s.* 4, *sub-s.* 1.

In re KIMBER. VALE *v.* ROCKMAN
Tomlin J. 749

GRAVE—Burial—Private vault—Extent of grantee's interest in vault and grave
See BURIAL. 671

—— Gift for maintenance—Validity—Rule against perpetuities - - 464
See WILL 2.

HIGHWAY—*Main Road through Tunnel—Repair of Tunnel — Liability of County Council to contribute towards Cost of Repair—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 11, *sub-s.* 2; *s.* 97.

REIGATE CORPORATION *v.* SURREY COUNTY COUNCIL - - - - **Russell J. 359**

2. —— *Maintenance—Increase of Traffic—Deterioration of Road made under Specification of local Act—Measure of Liability — Standard of Repair — Manchester Corporation Waterworks and Improvement Act*, 1875 (38 & 39 *Vict. c. clxi.*), *s.* 14, *sub-s. ii.*

Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. *Attorney-General* [1915] A. C. 654; *Attorney-General for Ireland* v. *Lagan Navigation Co.* [1924] A. C. 877; and *Attorney-General* v. *Great Northern Ry. Co.* [1916] 2 A. C. 356 applied. MANCHESTER CORPORATION *v.* AUDENSHAW URBAN DISTRICT COUNCIL AND DENTON URBAN DISTRICT COUNCIL **Eve J. 127 and C. A. 763**

HOUSING—House unfit for human habitation—Notice to repair—Expense of repairs carried out by local authority—Charge - - - - - **567**
See LOCAL AUTHORITY.

INDUSTRIAL AND PROVIDENT SOCIETY — *Alteration of Rules—Ultra vires—Liability of Members to take additional Shares—Contract between Members and Society—Voluntary Liquidation—Liability to contribute—Cessation of Membership—Industrial and Provident Societies Act*, 1893 (56 & 57 *Vict. c.* 39).

Biddulph and District Agricultural Society v. *Agricultural Wholesale Society* [1925] Ch. 769; [1927] A. C. 76 considered.

Dibble v. *Wilts and Somerset Farmers, Ld.* [1923] 1 Ch. 342 referred to. *In re* WILTS AND SOMERSET FARMERS, LD. - **Romer J. 809**

INFANT—*Legacy—Payment out of Court—Majority according to Law of Domicil.*

In re SCHNAPPER - - **Clauson J. 420**

—— Accumulations during infancy—Period of twenty-one years from testator's death—Minority years not to be counted - - - - - **88**
See LAW OF PROPERTY **1.**

—— Bequest of trust fund to infant for life—Interest payable from death of testator - - - - - **716**
See WILL **1.**

—— Member of fluctuating class—Destination of accumulations during minority - - - - - **330**
See ACCUMULATIONS.

INSURANCE—*Life Insurance—Assignment of Policy—Subsequent Extension of Period of Insurance by Assured—Extension effected by Indorsement on original Policy—Death of Assured during extended Period—Right of Assignee to Policy Money—Trust—Variation of original Contract of Insurance—No new Contract.*

ROYAL EXCHANGE ASSURANCE *v.* HOPE **Tomlin J. and C. A. 179**

2. —— —— *Policy — Suicide, Condition against—Exception of bona fide Interests in Third Parties — Mortgage — Assignment of Policy to Assurance Company.*

White v. *British Empire Mutual Life Assurance Co.* (1868) L. R. 7 Eq. 394 distinguished. ROYAL LONDON MUTUAL INSURANCE SOCIETY, LD. *v.* BARRETT **Tomlin J. 411**

3. ——*Marine Insurance—Company—Winding Up—Proof of Debt—Agreement between two Insurance Companies—Participation in Profits and Losses—Construction—Absence of Stamped Policies—Rejection of Proof—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 91, 92, 93—*Marine Insurance Act*, 1906 (6 *Edw.* 7, *c.* 41), *ss.* 22, 23.

Home Marine Insurance Co. v. *Smith* [1898] 1 Q. B. 829; [1898] 2 Q. B. 351 applied. *In re* NATIONAL BENEFIT ASSURANCE CO., LD. *Ex parte* ENGLISH INSURANCE CO., LD. - - - **Eve J. and C. A. 74**

—— Motor accidents—Third party risk—Action by injured party against assured—Bankruptcy of assured—Judgment after bankruptcy—Trustee in bankruptcy's right against insurance company - - **793**
See BANKRUPTCY **3.**

—— Russian reinsurance company—Branch office in England—Confiscation by Soviet Decree—Action by company against English reinsurance company—Set-off - - - **922**
See COMPANY **5.**

INTERNATIONAL LAW—*Foreign Revenue Laws—Action for Enforcement by Sovereign of foreign State in English Court—Claim for Debt under foreign Statute—Creditor a foreign Subject—Claim for Succession Duty—English Assets of Foreigner domiciled Abroad—Cognizance of English Courts in such Proceedings—Statement of Claim—Application to strike out—R. S. C., Order* XXV., *r.* 4.

Municipal Council of Sydney v. *Bull* [1909] 1 K. B. 7 followed. *In re* VISSER. H.M. THE QUEEN OF HOLLAND (MARRIED WOMAN) *v.* DRUKKER - **Tomlin J. 877**

INTEREST—Time for commencement—Bequest of three trust funds—One given subject to annuity charged on it—Another given to infant for life—Interest payable from death of testator - - - - **716**
See WILL **1.**

INTESTACY — Administration bond — Administrator's threat to distribute without providing against liability —Quia timet action - - 290
See ADMINISTRATION 2.

—— Lunatic — Settlement of property in lifetime of lunatic by Court - 528
See LUNACY 2.

JOINT TENANCY—Land subject to a charge —Settled land - - - 689
See LAW OF PROPERTY 3.

JURISDICTION—Action by sovereign of foreign State in English Court—Foreign revenue laws—Claim against subject of State—Refusal to entertain - - - - - 877
See INTERNATIONAL LAW.

LANDLORD AND TENANT—*Lease—Covenant to insure against Fire in named Office "or in some other responsible insurance office to be approved by lessor"—Whether Alternative given to Lessee to select Office for Approval of Lessor—Desire of Lessor that all Houses on Estate should be insured in one Office—Whether a Ground for Refusal of Approval.*
Decision of Tomlin J. reversed. LORD TREDEGAR *v.* HARWOOD - - **C. A. 59**

2. —— —— *Restrictive Covenants — Construction—Breach—Subletting of Part of demised House—Forfeiture—Rent and Mortgage Interest Restrictions Act*, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 2, *sub-ss.* 1, 3.
BARTON *v.* KEEBLE - - **Eve J. 517**

3. —— *Sub-lease—Public House—Covenant not to assign without Consent—Consent on Condition of House becoming a tied House—Fine or Benefit in the Nature of a Fine—Breach of Covenant before Commencement of Act — Retrospective Construction — Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *ss.* 144, 205, *sub-s.* 1 (*xxiii.*)—*Landlord and Tenant Act*, 1927 (17 & 18 *Geo.* 5, *c.* 36), *s.* 19, *sub-s.* 1.
GARDNER & CO., LD. *v.* CONE
Maugham J. 955

—— House unfit for human habitation—Notice to repair—Expense of repairs effected by local authority—Charge on entirety of interests in property
See LOCAL AUTHORITY. **567**

LAW OF PROPERTY — *Accumulation — Period — Twenty-one Years from Testator's Death—Minority Accumulations arising during that Period—Minority Years not to be counted in that Period — Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 43—*Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 165.
In re Holford [1894] 3 Ch. 30, 46 applied.
In re MABER. WARD *v.* MABER **Astbury J. 88**

2. —— *Administration—Copyholds—Entail —Gavelkind Custom of Descent—Undivided Shares—Statutory Trusts—Entailed Interest in Personalty — Absolute Interest — Law of Property Act*, 1922 (12 & 13 *Geo.* 5, *c.* 16), *s.* 128; *Sch.* 12, *para.* 1 (*a*) (*d*); *para* 2; *para.* 8, *proviso* (*iv.*)—*Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *ss.* 35, 130, 176, *sub-s.* 4; 202 *and* 207, *proviso* (*a*); *Sch.* 1, *Part I., Part IV., para.* 1, *sub-para.* 4 — *Administration of Estates Act*, 1925 (15 *Geo.* 5, *c.* 23), *s.* 3, *sub-s.* 1 (*ii.*), *ss.* 45, 51, *sub-s.* 4.
In re PRICE - **Clauson J. 579**

3. —— *Joint Tenancy—Land subject to a Charge—Settled Land—"Not being settled land"—Settled Land Act*, 1925 (15 *Geo.* 5, *c.* 18), *s.* 1, *sub-s.* 1 (*v.*); *s.* 2—*Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *ss.* 36, 205, *sub-s.* 1 (*xxvi.*); *s.* 207 (*a*).
In re GAUL AND HOULSTON'S CONTRACT
Clauson J. and C. A. 689

4. —— *Land— Undivided Shares—Trust for Sale—Settlement of undivided Share—Trustees Persons interested in the Land — Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 35—*Law of Property (Amendment) Act*, 1926 (16 & 17 *Geo.* 5, *c.* 11), *Sched.*
In re Cliff Contract [1927] 2 Ch. 94 followed.
In re HAYWARD. MERSON *v.* HAYWARD
Clauson J. 367

5. —— *Open Space— Yard in Rear of Houses —Ownership in undivided Shares—"Open space of land"—Leave of Court to Sale by Public Trustee—Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *Sch. I., Part V., para.* 2.
In re BRADFORD CITY PREMISES
Tomlin J. 138

6. —— *Transitional Provisions—Freehold Land — Undivided Shares — Three Shares settled—Life Tenants and Remaindermen—One Share absolute—Entirety vested in single personal Representative of last surviving Trustee — Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *Sch. I., Part* 4, *para.* 1, *sub-para.* 1.
In re MYHILL. HULL *c.* MYHILL
Astbury J. 100

7. —— —— *Land held in Equity in undivided Shares vested in Possession — Entirety of Land vested in Trustees in trust for Persons entitled in undivided Shares — Settled Land — Will — Construction — Devise to trustees — Extent of Devise —Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *Sch. I., Part IV., para.* 1, *sub-paras.* 1 *and* 3—*Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 31.
In re DAWSON'S SETTLED ESTATES
Clauson J. 421

8. —— *Trusts of Will—Trustees to divide Income for a Period—Trust for Sale on Cesser —Settled Land or Land held in undivided Shares—Transitional Provisions of Law of Property Act*, 1925, *and Settled Land Act*, 1925—*Tenant for Life and Remainderman—Statutory Trusts for Sale—Powers of Management of Trustees—Repairs, Costs of—How borne as between Capital and Income—*

LAW OF PROPERTY—*continued.*

Discretion of Trustees — Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 102, *sub-ss.* 1, 3; *Sch. II., para.* 1, *sub-para.* 2—*Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 28, *sub-ss.* 1, 2; *Sch. I., Part IV., para.* 1, *sub-paras.* 1, 3.

In re Higgs' and May's Contract [1927] 2 Ch. 249 followed.

In re Gray [1927] 1 Ch. 242 distinguished.

In re Hotchkys (1886) 32 Ch. D. 408 followed. *In re* Robins. Holland *v.* Gillam - - - - **Tomlin J. 721**

9. —— *Will—Personalty Settlement—Residence for Widow—Direction to purchase—Whether held on Trust for Sale—Contrary Intention—"Unless the settlement otherwise provides"—Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *ss.* 25, 32.

In re Hanson. Hanson *v.* Eastwood **Astbury J. 96**

LEASE—Bequest of "my present lease"—Subsequent renewal of lease—Codicil confirming the will - - **351**
See Will **5.**

—— Lessee's covenant to insure against fire in named office "or in some other responsible insurance office to be approved by lessor"—Decision of lessor that all houses on estate should be insured in one office—Whether ground for refusal of approval - - - - **59**
See Landlord and Tenant **1.**

—— Public house — Covenant by tenant not to assign without landlord's consent — Consent conditional on house becoming a tied house—Fine or benefit in nature of fine - **955**
See Landlord and Tenant **3.**

—— Restrictive covenants — Subletting of part of demised house—Forfeiture
See Landlord and Tenant **2.** **517**

LEGACY — Bequest of all rights in play — Contract for sale of film rights by testator—Completion after death—Right of legatee to purchase money
See Will **7.** **577**

—— Bequest of three trust funds — One charged with annuity and another given to infant for life — Interest payable from death of testator **716**
See Will **1.**

—— Infant legatee—Money in Court—Payment out on attaining majority—Majority according to law of domicil - - - - - **420**
See Infant.

—— Secret trust — Verbal instructions to one trustee—Written memorandum on date of codicil giving legacy—Validity - - - - **614**
See Will **3.**

LICENSED PREMISES—Form of return for rating purposes—Action for declaration of invalidity—Withdrawal of defence—Right to proceed to trial and prove invalidity - - **310**
See Rates.

LIMITATION OF ACTION — *Debentures — Specialty Debt — Acknowledgment — Balance Sheets in Notices and Reports signed by Directors stating Liability under Debentures—Civil Procedure Act*, 1833 (**3** *&* **4** *Will.* **4**, *c.* 42), *ss.* 3, 5.

In re Atlantic and Pacific Fibre Importing and Manufacturing Co., Ld. Viscount Burnham *v.* Atlantic and Pacific Fibre Importing and Manufacturing Co., Ld. - - - - - **Clauson J. 836**

2. —— *Lunatic—Fund in Court—Master's Certificate, no Heir at Law or Next of Kin—Escheat—Bona vacantia—Ex gratia Grant—Indemnity — Mistake of Fact — Claim by alleged Next of Kin—Droits of the Crown—Limitation Act*, 1623 (21 *Jac.* 1, *c.* 16).

Att.-Gen. v. *Köhler* (1861) 9 H. L. C. 654 discussed.

In re Robinson [1911] 1 Ch. 502 considered.

In re Mason - - **Romer J. 385**

LIQUIDATOR—Claim in winding up against secretary of company—Extent of operation of Companies (Consolidation) Act, 1908, s. 215 - - **861**
See Company **7.**

—— Industrial and provident society—Alteration in rules — Liability to take additional shares — Liability to contribute in winding up - **809**
See Industrial and Provident Society.

—— Misfeasance — No wilful default — No right to indemnity - - - **609**
See Company **3.**

LOCAL AUTHORITY — *Notice to repair Premises — Service on Rack-rent Owner — Notice not complied with—Repairs carried out by Local Authority—Charge on all interested in the Premises — Public Health Act*, 1875 (**38** *&* **39** *Vict. c.* 55), *s.* 257 — *Housing, Town Planning, &c., Act*, 1919 (**9** *&* **10** *Geo.* **5**, *c.* 35), *s.* 28—*Housing Act*, 1925 (15 *Geo.* 5, *c.* 14), *s.* 3.

Paddington Borough Council *v.* Finucane - - - - **Russell J. 567**

—— Electric undertaking—Right of individual to supply electricity within area - - - - - - **171**
See Electricity.

—— Quia timet action—Action dismissed with costs — Right to costs as between solicitor and client—Public Authorities Protection - **31 and 235**
See Waterworks.

LOCAL GOVERNMENT—"*Street*"—*Country Lane—Power of Local Authority to lay Gas and Water Mains—Character of Land—Subsequent Change—Building Development*—"*Land*

LOCAL GOVERNMENT—*continued.*

not dedicated to public" — *Consent of Owners to laying Pipes—Local Authorities' special Act — Gasworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 15), *ss.* 6, 7—*Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 28, 29—*City of Ripon Act*, 1865 (28 *Vict. c. cxxvi.*), *s.* 2 — *Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 54—*Ripon Corporation Act*, 1886 (49 & 50 *Vict. c. lxvii.*), *ss.* 2, 4 — *Ripon Corporation Act*, 1901 (1 *Edw.* 7, *c. ccxlvi.*), *ss.* 3, 37—*Public Health Act*, 1925 (15 & 16 *Geo.* 5, *c.* 71), *s.* 80.

DAVIES *v.* CORPORATION OF RIPON **Tomlin J. 884**

2. —— *Street—Notice to sewer, pave, etc.—Omission to serve a Frontager — Effect of Omission on Liability of Frontagers served—Recovery of Expenses by Local Authority—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257.

The view expressed by Kekewich J. in *Handsworth District Council* v. *Derrington* [1897] 2 Ch. 438, 449 as to the effect of such an omission upon the liability of frontagers served, dissented from. SUNDERLAND CORPORATION *v.* GRAY - - **Clauson J. 756**

—— Tunnel containing main road—Liability of County Council to contribute towards cost of repair - - **359**
See HIGHWAY **1.**

LUNACY — *Receiver — Lunatic's Business carried on by Receiver—Order for Payment by Receiver to Post-receivership Creditors—Creditors not Parties to Order — Death of Lunatic before Order completed — Claim by Creditors to charge on Moneys ordered to be paid — Payment out of Fund in Court to Executors of Lunatic — Administration Action.*

In re Bennett [1913] 2 Ch. 318 approved. *In re* WHEATER - - - - **C. A. 223**

2. —— *Settlements of Lunatics' Property—Applications by Mother — Second Cousins —Change of Law of Intestacy—Change in Circumstances—*"*Suffer an injustice*"*—Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 171, *sub-s.* 1 (*b*) (*c*).

In re ROWLAND HENRY BLYTH GREENE. *In re* WINIFRED HARRIET BLYTH GREENE. *In re* SARAH HANNAH WHITWORTH. *In re* E. A. *In re* CHARLES RICHARD MATHEWS FRASER. *In re* ROBERT JAMES WOOD **C. A. 528**

LUNATIC—Fund in Court—Master's certificate, that no heir at law or next of kin — Escheat — Bona vacantia — Claim by alleged next of kin - **385**
See LIMITATION OF ACTION **2.**

MAINTENANCE—Discretionary trust for—Sums not applied in maintaining A. payable to B.—Right of A. and B. to have the fund applied as they direct—Assignable interest - **915**
See TRUST.

MAINTENANCE—*continued.*

—— Infant—Accumulation of surplus income—Infant member of fluctuating class—Destination of accumulations
See ACCUMULATIONS. **330**

MASTER AND SERVANT — Accident — Incapacity—Voluntary payment of compensation—Cesser on application for review and termination—Alleged breach of statutory duty **484**
See WORKMEN'S COMPENSATION.

MEMORANDUM OF ASSOCIATION—Declaration of rights of preference shares — Winding up — Surplus assets—Right to participate - **144**
See COMPANY **8.**

MISFEASANCE—Liquidator of company—No wilful default — Indemnity—Liquidator not a trustee - **609**
See COMPANY **3.**

MORTGAGE—Life assurance policy—Condition against suicide—Exception in favour of bona fide interests in third parties—Assignment of policy by way of mortgage—Assurance company the mortgagees - **411**
See INSURANCE **2.**

—— Mortgage of personalty fund—Bequest of fund—Direction for payment of debts out of special fund—Contrary intention - - - - **45**
See WILL **8.**

—— Proviso for retention of bonus by mortgagee — Clause giving mortgagee increased benefit if mortgagor became bankrupt—Right of mortgagee against trustee in bankruptcy - - - - **737**
See BANKRUPTCY **1.**

—— Subsequent further charge—Investigation of title on creation of further charge—Taxation of costs - **379**
See COSTS.

MOTOR CAR—Insurance against third party risks — Action by injured person against assured — Bankruptcy of assured—Purported release by bankrupt of claims against insurance company—Trustee in bankruptcy —Right to recover - - **793**
See BANKRUPTCY **3.**

NOMINATION—War Savings Certificates—Money on deposit at municipal savings bank - - - **749**
See GIFT BY NOMINATION.

NOTICE —Contract—Determination—Implication that contract not intended to be perpetual—Determination by notice - - - **174 and 447**
See CONTRACT.

OPEN SPACE—Yard in rear of houses—Ownership in undivided shares—Leave of Court to sale by Public Trustee - - - - 138
See LAW OF PROPERTY 5.

OPTION—Grant by executors of option for lease to tenant from year to year—No power to grant option - 847
See VENDOR AND PURCHASER 1.

PARTICULARS—*Passing-off Action—Pleading — Traverse of Plaintiff's Allegations — Pregnant Negative—Onus of Plaintiff—Rules of Supreme Court, Order* XIX., *rr.* 6, 7.
LA RADIOTECHNIQUE *v.* WEINBAUM
Clauson J. 2

PARTNERSHIP — *Articles — Construction—Covenant not to practise as a Solicitor within limited Area — Acting as managing Clerk to Solicitor at a fixed Salary within prohibited Area—Whether Breach of Covenant.*
Palmer v. *Mallet* (1887) 36 Ch. D. 411 and *Robertson* v. *Willmott* (1909) 25 Times L. R. 681; [1909] W. N. 155 distinguished. Decision of Clauson J. reversed. WAY *v.* BISHOP - - - - - - C. A. 647

PASSING-OFF—Onus of proof—Traverse of plaintiffs' allegations — Particulars refused - - - - - 2
See PARTICULARS.

PERPETUITY — Gift for maintenance of graves — Gift over on failure to maintain—Validity - - 464
See WILL 2.

—— Property tied up by reference to descendants of Queen Victoria living in 1926—Validity - - - 471
See WILL 11.

PERSONAL REPRESENTATIVES—Agreement to give tenant from year to year option to lease—No power to grant option - - - - 847
See VENDOR AND PURCHASER 1.

—— Remainder to children or their "personal representatives" — Whether executors or next of kin - - 214
See WILL 6.

—— Tenant for life — Land ceasing to be settled land on his death—Special or general representatives - 163
See SETTLED LAND 2.

PERSONALTY—Bequest—Fund subject to mortgages—Special fund for payment of debts—How mortgage debts to be borne—Contrary intention 45
See WILL 8.

PETITION OF RIGHT—Service of petition—Funds in Court—Bona vacantia—Ex gratia payments by Crown—Subsequent claim by alleged next of kin - - - - - - 385
See LIMITATION OF ACTION 2.

PLEADING—Passing-off action—Traverse of plaintiffs' allegations — Onus of proof—Particulars refused - 2
See PARTICULARS.

POLICY OF INSURANCE—Agreement between two insurance companies to divide profits and loss—Absence of stamped policies—Rejection of proof
See INSURANCE 3. 74

—— Assignment—Subsequent extension of period of policy by assured—Policy money becoming payable during extended period—Right of assignee
See INSURANCE 1. 179

POWER OF APPOINTMENT—*Exercise by Will—Gift to Object of Power upon "protective trusts"—Incorporation of statutory Clause — Validity—Excessive Execution—Delegation—Perpetuity—Trustee Act,* 1925 (15 *Geo.* 5, *c.* 19), *s.* 33.
In re BOULTON'S SETTLEMENT TRUST. STEWART *v.* BOULTON - - Eve J. 703

PRACTICE—Action for declaration—Withdrawal of defence—Right to proceed to trial and obtain declaration 310
See RATES.

—— Service of petition of right—Funds in Court—Bona vacantia—Ex gratia payments by Crown — Subsequent claim by alleged next of kin - 385
See LIMITATION OF ACTION 2.

PRINCIPAL AND AGENT—Foreign will—English assets—Grant of administration to attorney of foreign principals — Foreign debts — Position of administrator - - - - - 433
See ADMINISTRATION 1.

PRINCIPAL AND SURETY—Administration bond—Right of bondsmen to quia timet relief - - - 290
See ADMINISTRATION 2.

PROTECTIVE TRUSTS — Appointment to object of special power upon protective trusts — Invalidity of discretionary trusts - - - 703
See POWER OF APPOINTMENT.

PUBLIC AUTHORITY—Successful defendant in quia timet action — Costs — Solicitor and client—Public authorities protection - - 31 and 235
See WATERWORKS.

PUBLIC HOUSE—Covenant of tenant not to assign without landlord's consent—Consent on condition of house becoming a tied house—Fine or benefit in the nature of a fine - 955
See LANDLORD AND TENANT 3.

QUIA TIMET—Action against public authority to prevent filling of reservoir—Sustainable action—Costs of successful defendant — Solicitor and client—Public authorities protection - - - - 31 and 235
See WATERWORKS.

QUIA TIMET—*continued.*

—— Administration bond—Right of bondsmen to relief - - - 290
See ADMINISTRATION 2.

RATES—*Rateable Value—Licensed Premises—Form of Return—Requisitions for gross Takings and Outgoings—Invalidity—Action for Declaration—Withdrawal of Defence—Right of Plaintiff to proceed to Trial and prove Invalidity—Costs—Rating and Valuation Act*, 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 40—*Rating and Valuation Act* (*Returns*) *Rules*, 1926.

Dyson v. *Att.-Gen.* [1912] 1 Ch. 158 applied. GRANT *v.* KNARESBOROUGH URBAN DISTRICT COUNCIL - - Astbury J. 310

—— Special expenses—Contributory place—Outgoings and not charge on land - - - - - - 340
See VENDOR AND PURCHASER 2.

REALTY—Scottish executors—Resealing of confirmation in England—Power to sell land - - - - 479
See EXECUTOR.

—— Undivided share in copyhold—Entailed interest—Statutory trusts—Devolution as personalty - - 579
See LAW OF PROPERTY 2.

RECEIVER—Appointment by debenture holder—Power conferred on receiver to "get in property . . . . charged"—Implied right to sue in company's name - - 840
See COMPANY 2.

—— Lunatic's business carried on—Trade debts incurred during receivership—Order for payment—Death of Lunatic before order carried out—Right of executors - - 223
See LUNACY 1.

RECEIVING ORDER—Petitioner's offer to allow dismissal of petition on payment of solicitor and client costs—Extortion - - - 199
See BANKRUPTCY 4.

REGISTRATION OF DENTISTS—Non-payment of annual retention fee—Power to remove from register 318
See DENTIST.

RESIDENCE—Will—Direction to purchase for widow—Whether held on trust for sale - - - - - 96
See LAW OF PROPERTY 9.

RESTRAINT OF TRADE—*Price Maintenance Agreement—Proprietary Article—"Howsoever acquired"—Validity.*

Decision of Astbury J. [1927] 2 Ch. 333 affirmed. PALMOLIVE CO. (OF ENGLAND), LD. *v.* FREEDMAN - - - C. A. 264

RESTRICTIVE COVENANT—Covenant not to practise as solicitor—Acting as managing clerk - - - 647
See PARTNERSHIP.

—— Lease—Breach by subletting part of demised premises—Forfeiture - 517
See LANDLORD AND TENANT 2.

—— Minimum cost of building fixed—Great increase of cost of building—Original minimum adhered to - 902
See COVENANT.

ROAD—Construction under power in local Act—Statutory obligation to maintain—Deterioration of road under greatly increased traffic—Measure of liability to maintain - - 763
See HIGHWAY 2.

—— Construction under special Act—Obligation of constructors thereafter to maintain—Measure of obligation—Standard of repair - - 227
See HIGHWAY 1.

RULES AND ORDERS:—

—— *General order under Solicitors' Remuneration Act*, 1881, *cl.* 2 (*a*), *Sch. I., Part I., r.* 10: *In re* COWARD, CHANCE & CO. - - Russell J. 379

—— *Rating and Valuation Act* (*Returns*) *Rules*, 1926: GRANT *v.* KNARESBOROUGH URBAN DISTRICT COUNCIL Astbury J. 310

—— *R. S. C., Order* XIX., *rr.* 6, 7: DE LA GARDE *v.* WORSNOP & CO. Clauson J. 17

—— *R. S. C., Order* XXV., *r.* 4: *In re* VISSER - - - Tomlin J. 877

—— *Workmen's Compensation Rules*, 1926, *rr.* 19, 59: CATTON *v.* ASHWELL AND NESBIT, LD. Clauson J. and C. A. 484

SCOTLAND — Scottish executors — English land—Confirmation resealed in England—Power to sell real estate 479
See EXECUTOR.

SETTLED LAND—*Compound settlement—Jointure Rent-charges—Termination of—Effect on compound Settlement—Purchase of Lands out of Residuary Personal Estate or Proceeds of Sale of Land so purchased—Form of Conveyance to Trustees—Settled Land Act*, 1925 (15 *Geo.* 5, *c.* 18), *s.* 3.

In re DRAYCOTT SETTLED ESTATE Tomlin J. 371

2.—— *Settlement—Determination on Death of Tenant for Life—Grant of Probate to Executor of Tenant for Life—Sale of settled Land by Executor—Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 204, *sub-s.* 1—*Administration of Estates Act*, 1925 (15 *Geo.* 5, *c.* 23), *ss.* 1, 3, 22, *sub-s.* 1; 23, 24, 37, *sub-s.* 1; 55, *sub-s.* 1 (*xi.*).

In re BRIDGETT AND HAYES' CONTRACT Romer J. 163

SETTLED LAND—*continued.*

3. —— *Trust for Sale—Meaning of "immediate binding trust for sale"—Overreaching of prior equitable Interests—Compound settlement—Interpretation of "trust for sale"—Tenant for life—Settled Land Act*, 1925 (15 *Geo.* 5, *c.* 18), *ss.* 1, *sub-ss.* 1 (*i.*), 7, 20, *sub-s.* 1 (*viii.*)—*Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 2, *sub-s.* 2.

The interpretation of the phrase "immediate binding trust for sale" adopted by Tomlin J. in *In re Leigh's Settled Estates* [1926] Ch. 852 and *In re Leigh's Settled Estates* (*No.* 2) [1927] 2 Ch. 13 not followed. *In re* PARKER'S SETTLED ESTATES. PARKER *v.* PARKER - - - - **Romer J. 247**

4. —— *Will—"Land held under one and the same settlement"—Vesting in trustees—"Trustees (if any) of the settlement" mean Trustees of the Settlement under the old Law—Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *Sch. I., Part IV., para.* 1, *sub-para.* 3—*Settled Land Act*, 1925 (15 *Geo.* 5, *c.* 18), *s.* 30, *sub-s.* 3.

In re CATCHPOOL. HARRIS *v.* CATCHPOOL **Russell J. 429**

—— Land held by joint tenants subject to prior charge—"Not being settled land" - - - - - - **689**
See LAW OF PROPERTY 3.

SETTLEMENT—*Covenant to settle after-acquired Property—Will made after Covenant—Construction—Forfeiture—Bequest of Income to Covenantor for Life, until any Event should happen whereon his title to the Income would cease.*

In re SMITH. FRANKLIN *v.* SMITH **Clauson J. 10**

—— Determination on death of tenant for life—Legal estate vesting in general representative - - - **163**
See SETTLED LAND 2.

—— Jointure rent-charge—Compound settlement—Termination of rent-charge—Effect on compound settlement
See SETTLED LAND 1. **371**

—— Land vested in trustees for sale subsequent to a charge for portions secured by a term of years—Meaning of "immediate binding trust for sale" - - - **247**
See SETTLED LAND 3.

—— Lunatics' property—Settlement by Court—Applications by mother—Change of law of intestacy—Lost will - - - - - **528**
See LUNACY 2.

—— Undivided shares—Land held under one and the same settlement—Vesting in trustees (if any) of the settlement—Trustees of the settlement under the old law referred to
See SETTLED LAND 4. **429**

SET-OFF—Russian reinsurance company with branch office in England—Confiscation by Soviet Decree—Action by Russian company in England—Right to set off - **922**
See COMPANY 5.

SEWERS—Sewer in public road—Soil of road in private ownership—Right to connect drain through subsoil
See COVENANT. **902**

SOLICITOR — Covenant not to practise within limited area—Acting as managing clerk - - - **647**
See PARTNERSHIP.

—— Mortgage—Further charge—Taxation of costs—Investigation of title - **379**
See COSTS.

SPECIFIC PERFORMANCE—Contract for sale of land—Property described as subject to tenancy from year to year—Subsequently revealed agreement by executors to give option for lease to tenant at same rent—No power to grant option - **847**
See VENDOR AND PURCHASER 1.

—— Sale subject to all outgoings—Rates for special expenses on contributory place—Outgoings and not charged on land - - - - **340**
See VENDOR AND PURCHASER 2.

—— —— Vendor a company—Receiver appointed by debenture holder—Power conferred on receiver to get in property charged—Right of receiver to sue for specific performance or (alternatively) rescission in company's name - - - **840**
See COMPANY 2.

STAMP—Unstamped policies—Company—Winding up—Rejection of proof **74**
See INSURANCE 3.

STATUTES:—

1623.

21 Jac. 1, c. 16 (Limitations): *In re* MASON **Romer J. 385**

1833.

3 & 4 Will. 4, c. 42 (Civil Procedure), ss. 3, 5: *In re* ATLANTIC AND PACIFIC FIBRE IMPORTING AND MANUFACTURING CO., LD. **Clauson J. 836**

1837.

1 Vict. c. 26 (Wills), s. 24: *In re* BANCROFT **Russell J. 577**

In re DAVIES - - **Astbury J. 24**

In re REEVES - - **Russell J. 351**

—— —— s. 31: *In re* DAWSON'S SETTLED ESTATES - - **Clauson J. 421**

1847.

10 & 11 Vict. c. 15 (Gasworks), ss. 6, 7: DAVIES *v.* RIPON CORPORATION **Tomlin J. 884**

STATUTES—*continued.*

10 & 11 Vict. c. 17 (Waterworks), ss. 6, 27 : Graigola Merthyr Co., Ld. *v.* Swansea Corporation **Tomlin J. 31**

—— —— ss. 28, 29 : Davies *v.* Ripon Corporation - - **Tomlin J. 884**

10 & 11 Vict. c. 65 (Cemeteries), ss. 40, 42 : Hoskyns-Abrahall *v.* Paignton Urban District Council **Eve J. 671**

1860.

23 & 24 Vict. c. 34 (Petitions of Right), s. 5 : *In re* Mason - **Romer J. 385**

1863.

26 & 27 Vict. c. 93 (Waterworks), s. 3 : Graigola Merthyr Co., Ld. *v.* Swansea Corporation **Tomlin J. 31**

1865.

28 Vict. c. cxxvi. (Ripon Corporation), s. 2 : Davies *v.* Ripon Corporation - - - **Tomlin J. 884**

1875.

38 & 39 Vict. c. 55 (Public Health), s. 21 : Grant *v.* Derwent - **Astbury J. 902**

—— —— s. 54 : Davies *v.* Ripon Corporation - - **Tomlin J. 884**

—— —— ss. 150, 257 : Sunderland Corporation *v.* Gray - **Clauson J. 756**

—— —— ss. 229, 230, 233, 257 : Calder's Yeast Co., Ld. *v.* Stockdale **Lawrence J. and C. A. 340**

—— —— s. 257 : Paddington Borough Council *v.* Finucane **Russell J. 567**

38 & 39 Vict. c. clxi. (Manchester Waterworks), s. 14 : Manchester Corporation *v.* Audenshaw Urban District Council **Eve J. 127 and C. A. 763**

1879.

42 & 43 Vict. c. 31 (Public Health), s. 2, sub-s. 2 : Hoskyns-Abrahall *v.* Paignton Urban District Council **Eve J. 671**

1881.

44 & 45 Vict. c. 41 (Conveyancing), s. 43, sub-s. 2 : *In re* King. Public Trustee *v.* Aldridge **Romer J. 330**

—— —— s. 43 : *In re* Stokes **Tomlin J. 716**

—— —— s. 43 : *In re* Maber **Astbury J. 88**

1886.

49 & 50 Vict. c. lxvii. (Ripon Corporation), ss. 2, 4 : Davies *v.* Ripon Corporation - - **Tomlin J. 884**

1887.

50 & 51 Vict. c. 40 (Savings Banks), s. 3 : *In re* Kimber - **Tomlin J. 749**

STATUTES—*continued.*

1888.

51 & 52 Vict. c. 41 (Local Government), ss. 11, 97 : Reigate Corporation *v.* Surrey County Council **Russell J. 359**

1889.

52 & 53 Vict. c. 49 (Arbitration), s. 4 : De La Garde *v.* Worsnop & Co. **Clauson J. 17**

1890.

53 & 54 Vict. c. 59 (Public Health), s. 18 : Grant *v.* Derwent - **Astbury J. 902**

1891.

54 & 55 Vict. c. 39 (Stamp), ss. 91, 92, 93 : *In re* National Benefit Assurance Co., Ld. - **Eve J. and C. A. 74**

1893.

56 & 57 Vict. c. 39 (Industrial Provident) : *In re* Wilts and Somerset Farmers, Ld. - - **Romer J. 809**

56 & 57 Vict. c. 53 (Trustee), s. 24 : *In re* Windsor Steam Coal Co. (1901), Ld. - - - **Maugham J. 609**

56 & 57 Vict. c. 61 (Public Authorities), s. 1 : Graigola Merthyr Co., Ld. *v.* Swansea Corporation **Tomlin J. 31 and C. A. 235**

1901.

1 Edw. 7, c. cxlvi. (Ripon Corporation), ss. 3, 37 : Davies *v.* Ripon Corporation - - **Tomlin J. 884**

1905.

5 Edw. 7, c. 15 (Trade Marks), ss. 22, 23, 35 : *In re* Cranbux, Ld.'s, Application - - - **Clauson J. 829**

—— —— s. 37 : *In re* Ducker's Trade Mark - - - **Tomlin J. 405**

1906.

6 Edw. 7, c. 41 (Marine Insurance), ss. 22, 23 : *In re* National Benefit Assurance Co., Ld. **Eve J. and C. A. 74**

1908.

8 Edw. 7, c. 69 (Companies), s. 215 : *In re* Etic, Ld. - **Maugham J. 861**

1909.

9 Edw. 7, c. 34 (Electric Lighting), s. 23 : Caerphilly Urban Council *v.* Griffin - - **Russell J. 171**

1914.

4 & 5 Geo. 5, c. 59 (Bankruptcy), s. 5, sub-s. 3 : *In re* A Debtor **Astbury and Tomlin JJ. 665**

—— —— s. 5, sub-s. 3 : *In re* A Debtor **C. A. 199**

4 & 5 Geo. 5, c. clxiv. (Wimbledon Corporation), s. 84 : Grant *v.* Derwent **Astbury J. 902**

STATUTES—*continued.*

1915.

5 & 6 Geo. 5, c. 93 (War Loan), s. 5: *In re* KIMBER - - **Tomlin J. 749**

1918.

8 & 9 Geo. 5, c. 25 (War Loan), s. 2, sub-s. 4: *In re* KIMBER **Tomlin J. 749**

1919.

9 & 10 Geo. 5, c. 35 (Housing and Town Planning), s. 28: PADDINGTON BOROUGH COUNCIL *v.* FINUCANE **Russell J. 567**

9 & 10 Geo. 5, c. 79 (Trade Marks), s. 11: *In re* CRANBUX, LD.'S, APPLICATION - - - **Clauson J. 829**

9 & 10 Geo. 5, c. lxv. (Birmingham Corporation), s. 11: *In re* KIMBER **Tomlin J. 749**

1920.

10 & 11 Geo. 5, c. 12 (Savings Banks), s. 4: *In re* KIMBER - **Tomlin J. 749**

1921.

11 & 12 Geo. 5, c. 21 (Dentists), s. 7: TATTERSALL *v.* SLADEN **Astbury J. 318**

1922.

12 & 13 Geo. 5, c. 16 (Law of Property), s. 128; Sch. 12, paras. 1, 2 and 8: *In re* PRICE - - **Clauson J. 579**

1923.

13 & 14 Geo. 5, c. 32 (Rent and Mortgage Interest Restrictions), s. 2, sub-ss. 1, 3: BARTON *v.* KEEBLE **Eve J. 517**

1925.

15 Geo. 5, c. 14 (Housing), s. 3: PADDINGTON BOROUGH COUNCIL *v.* FINUCANE **Russell J. 567**

15 Geo. 5, c. 18 (Settled Land), ss. 1, sub-s. 1, 7, 20, sub-s. 1 (viii.): *In re* PARKER'S SETTLED ESTATES **Romer J. 247**

—— —— ss. 1, sub-s. 1 (v.); 2: *In re* GAUL AND HOULSTON'S CONTRACT **Clauson J. and C. A. 689**

—— —— s. 3: *In re* DRAYCOTT SETTLED ESTATE - - - **Tomlin J. 371**

—— —— s. 30, sub-s. 3: *In re* CATCHPOOL - - - **Russell J. 429**

—— —— s. 102, sub-ss. 1, 3; Sch. II., para. 1, sub-para. 2: *In re* ROBINS **Tomlin J. 721**

15 Geo. 5, c. 19 (Trustee), s. 30, sub-s. 1; s. 68, sub-s. 17: *In re* WINDSOR STEAM COAL CO. (1901), LD. **Maugham J. 609**

—— —— s. 31: *In re* KING. PUBLIC TRUSTEE *v.* ALDRIDGE - **Romer J. 330**

—— —— s. 33: *In re* BOULTON'S SETTLEMENT TRUST - - **Eve J. 703**

STATUTES—*continued.*

15 Geo. 5, c. 20 (Law of Property), s. 2, sub-s. 2: *In re* PARKER'S SETTLED ESTATES - - **Romer J. 247**

—— —— ss. 25, 32: *In re* HANSON **Astbury J. 96**

—— —— s. 28, Sch. I., Part IV., para. 1: *In re* ROBINS - - **Tomlin J. 721**

—— —— s. 35: *In re* HAYWARD **Clauson J. 367**

—— —— ss. 35, 130, 176, 202, 207, Sch. I., Part I., Part IV., para. 1, sub-para. 4: *In re* PRICE **Clauson J. 579**

—— —— ss. 36, 205, sub-s. 1 (xxvi.); 207 (*a*): *In re* GAUL AND HOULSTON'S CONTRACT - **Clauson J. and C. A. 689**

—— —— ss. 144, 205, sub-s. 1 (xviii.): GARDNER & CO., LD. *v.* CONE **Maugham J. 955**

—— —— s. 165: *In re* MABER **Astbury J. 88**

—— —— s. 171, sub-s. 1 (*b*) (*c*): *In re* GREENE - - - **C. A. 528**

—— —— s. 204, sub-s. 1: *In re* BRIDGETT AND HAYES' CONTRACT **Romer J. 163**

—— —— Sch. I., Part IV., para. 1 (1.): *In re* MYHILL - **Astbury J. 100**

—— —— Sch. I., Part IV., para. 1, sub-paras. 1 and 3: *In re* DAWSON'S SETTLED ESTATES - **Clauson J. 421**

—— —— —— para. 1, sub-para. 3: *In re* CATCHPOOL - - **Russell J. 429**

—— —— Sch. I., Part V., para. 2: *In re* BRADFORD CITY PREMISES **Tomlin J. 138**

15 Geo. 5, c. 23 (Administration of Estates), ss. 1, 3, 22, 23, 24, 27, sub-s. 1, 55, sub-s. 1 (xi.): *In re* BRIDGETT AND HAYES' CONTRACT - **Romer J. 163**

—— —— s. 3, sub-s. 1 (ii.); s. 45, s. 51, sub-s. 4: *In re* PRICE **Clauson J. 579**

—— —— s. 35: *In re* FEGAN **Tomlin J. 45**

—— —— ss. 36, 39: *In re* SPENCER AND HAUSER'S CONTRACT **Tomlin J. 598**

15 & 16 Geo. 5, c. 49 (Judicature), ss. 168, 175: *In re* HOWDEN AND HYSLOP'S CONTRACT - - **Astbury J. 479**

15 & 16 Geo. 5, c. 71 (Public Health), s. 80: DAVIES *v.* RIPON CORPORATION - - - **Tomlin J. 884**

15 & 16 Geo. 5, c. 84 (Workmen's Compensation), ss. 12, 21: CATTON *v.* ASHWELL AND NESBIT, LD. **Clauson J. and C. A. 484**

15 & 16 Geo. 5, c. 90 (Rating and Valuation), s. 40: GRANT *v.* KNARESBOROUGH URBAN DISTRICT COUNCIL **Astbury J. 310**

STATUTES—*continued.*

1926.

16 & 17 Geo. 5, c. 11 (Law of Property), Sched.: *In re* HAYWARD **Clauson J. 367**

1927.

17 & 18 Geo. 5, c. 36 (Landlord and Tenant), s. 19, sub-s. 1: GARDNER & Co., LD. *v.* CONE - **Maugham J. 955**

STATUTORY DUTY—Alleged breach—Accident—Voluntary payment of compensation—Cesser on application for review and determination - **484**
See WORKMEN'S COMPENSATION.

STATUTORY TRUSTS—Persons interested thereunder—Trustees for sale of an undivided share - - - **367**
See LAW OF PROPERTY **4.**

—— Undivided shares—Entirety vested in personal representative of surviving trustee—Three shares settled and one absolute—Person in whom vested - - - - - **100**
See LAW OF PROPERTY **6.**

—— —— Costs of repairs—Capital or income - - - - - **721**
See LAW OF PROPERTY **8.**

—— Undivided share in copyhold—Entailed interest—Absolute interest—Devolution as personalty - - **579**
See LAW OF PROPERTY **2.**

STREET—Frontagers—Notice to sewer, pave, etc.—Omission to serve one frontager—Effect on remaining frontagers - - - - - **756**
See LOCAL GOVERNMENT **2.**

SUICIDE—Life assurance policy—Condition invalidating policy on suicide—Exception in favour of bona fide interests in third parties—Loan by assurance company—Assignment of policy to company by way of mortgage - - - - **411**
See INSURANCE **2.**

TENANT FOR LIFE—Land ceasing to be settled land on his death—Special or general representatives - **163**
See SETTLED LAND **2.**

TENANT FOR LIFE AND REMAINDERMAN—Capital or income—Cash bonus - - - - - - **682**
See COMPANY **1.**

—— Statutory trusts—Costs of repairs—Capital or income - - - **721**
See LAW OF PROPERTY **8.**

TENDER—Instalment of debt—Whole debt over 50*l.*—Tender of instalment refused—Bankruptcy petition - **665**
See BANKRUPTCY **2.**

TRADE MARK—*Assignment—Goodwill of Business concerned in Goods for which Trade Mark registered—Duty of Registrar in investigating Title of Assignee—Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 22, 33, 35—*Trade Marks Act*, 1919 (9 *& 10 Geo.* 5, *c.* 79), *s.* 11.
In re CRANBUX, LD.'S, APPLICATION **Clauson J. 829**

2. —— *Registration—Non-user—Bona fide Intention to use—Contingent Intention—Intention to use through a limited Company—Removal of Mark—Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *s.* 37.
In re Batt's Trade Marks [1898] 2 Ch. 432, 439, 440 applied. *In re* DUCKER'S TRADE MARK - - - - - - **Tomlin J. 405**

TRANSITIONAL PROVISIONS—Undivided shares—Three shares settled and one absolute—Entirety vested in personal representative of surviving trustee—Person in whom vested on statutory trusts - - **100**
See LAW OF PROPERTY **6.**

TRESPASS—Sewers in public road—Subsoil in private ownership—Right to connect drain through subsoil
See COVENANT. **902**

TRUST—*Discretionary Trust for Maintenance—Discretion as to Method of applying Fund—No Discretion as to Amount—Application in Accordance with Directions of sole Objects of discretionary Trust—Assignable Interest.*
In re SMITH. PUBLIC TRUSTEE *v.* ASPINALL **Romer J. 915**

—— Legacy on secret trust—Verbal instructions—Written memorandum on date of codicil giving the legacy
See WILL **3.** **614**

TRUST FOR SALE—Land vested in trustee for sale subject to a charge for portions and a term of years—Meaning of "immediate binding trust for sale" - - - **247**
See SETTLED LAND **3.**

—— Will—Direction to purchase residence for widow—Whether held on trust for sale - - - - - **96**
See LAW OF PROPERTY **9.**

TRUSTEE—Liquidator of company—Misfeasance—No wilful default—No right to indemnity as trustee - **609**
See COMPANY **3.**

—— Undivided shares—Personal representative of last surviving trustee—Three shares settled and one share absolute—Person in whom entirety vested on statutory trusts
See LAW OF PROPERTY **6.** **100**

—— —— Question as to estate vested in trustees—Fee simple in entirety of land vested in trustees—Entirety held by trustees on statutory trusts
See LAW OF PROPERTY **7.** **421**

TRUSTEE—*continued.*

—— —— Vesting in trustees—"Land held under one and the same settlement"—Trustees (if any) of the settlement means trustees of the settlement under the old law - - - 429
See SETTLED LAND 4.

TRUSTEES FOR SALE—Contract to sell as such—No existing trust for sale—Offer to sell as personal representatives—Vendors' right to enforce contract - - - - 598
See VENDOR AND PURCHASER 3.

—— Holders of undivided share—Persons interested—Statutory trusts - 367
See LAW OF PROPERTY 4.

UNCERTAINTY—Property tied up by reference to lives of Queen Victoria's descendants in 1926—Validity 471
See WILL 11.

UNDIVIDED SHARES—Entailed copyhold—Absolute interest—Devolution as personalty - - - - 579
See LAW OF PROPERTY 2.

—— "Land held under one and the same settlement"—Vesting in trustees—"Trustees (if any) of the settlement" means trustees of the settlement under the old law - - 429
See SETTLED LAND.

—— Open space of land—Yard in rear of houses—Leave of Court to sale by Public Trustee - - - 138
See LAW OF PROPERTY 5.

—— "Persons interested"—Statutory trusts—Trustees for sale of a share - 367
See LAW OF PROPERTY 4.

—— Question as to estate vested in trustees—Fee simple in entirety of land vested in trustees—Entirety held by trustees on statutory trusts 421
See LAW OF PROPERTY 7.

—— Trusts to divide income among class for period—Subsequent trust for sale—Statutory trusts—Costs of repairs—Capital or income - 721
See LAW OF PROPERTY 8.

VALUATION FOR RATES—Form of return—Action for declaration of invalidity—Withdrawal of defence—Right to proceed to trial and prove invalidity - - - 310
See RATES.

VENDOR AND PURCHASER—*Contract for Sale of real Estate—Described as Subject to Tenancy from Year to Year—Written Agreement with Tenant subsequently disclosed—Option to take Premises "on any lease suitable to you at the same rent"—Undertaking not to advance Rent—Power of personal Representatives to grant Option—Construction of Agreement—Specific Performance.*

Smith v. *Colbourne* [1914] 2 Ch. 533 and *Oceanic Steam Navigation Co* v. *Sutherberry* (1880) 16 Ch. D. 236 applied. JOHNSON *v.* CLARKE - - - - - Maugham J. 847

2. —— *Rates—Special Expenses—Sewerage Works—Charge on Land—Outgoings—Specific Performance—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 229, 230, 233, 257.

CALDER'S YEAST CO., LD. *v.* STOCKDALE Lawrence J. and C. A. 340

3. —— *Sale by Auction—Contract—Title—Vendors contracting to sell as "Trustees for Sale" under a Will—No Trust for Sale in Will—Offer to sell as "personal representatives"—Form of making Title not essential—Assent by personal Representatives—Administration of Estates Act*, 1925 (15 *Geo.* 5, *c.* 23), *ss.* 36, 39.

In re Baker and Selmon's Contract [1907] 1 Ch. 238 followed. *In re* SPENCER AND HAUSER'S CONTRACT - - Tomlin J. 598

WAR SAVINGS CERTIFICATES—Power of depositor to give by nomination—Holding in excess of authorized amount—Effect of nomination 749
See GIFT BY NOMINATION.

WATER—Statutory power of local authority to lay water mains in streets—Country lane on which bungalows abut—Pipes laid with consent of owners - - - - 884
See LOCAL GOVERNMENT 1.

WATERWORKS — *Reservoir over Mine—Anticipated Danger of Flooding—Quia timet Action to prevent Refilling—Action dismissed—Costs—"Solicitor and client"—Jurisdiction to award in quia timet Action—Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

Harrop v. *Mayor of Ossett* [1898] 1 Ch. 525; *Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works* [1898] 2 Ch. 603; and *Grand Junction Waterworks Co.* v. *Hampton Urban Council* (1899) 63 J. P. 503 approved and followed.

Decision of Tomlin J. [1928] Ch. 31 affirmed. GRAIGOLA MERTHYR CO., LD. *v.* MAYOR, ALDERMEN AND BURGESSES OF SWANSEA Tomlin J. 31 and C. A. 235

WILL — *Bequest of Trust Funds—Legacy intended for Support of Infant—Interest on Legacies—Time for Commencement—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.

In re Moody [1895] 1 Ch. 101 followed. *In re* STOKES. BOWEN *v.* DAVIDSON Tomlin J. 716

WILL—*continued.*

2. —— *Cemetery—Gift for Maintenance of Graves—Validity—Alienation, Rule against Restraint of—Perpetuities, Rule against.*

In re Gage [1898] 1 Ch. 498 referred to. *In re* CHARDON. JOHNSTON *v.* DAVIES **Romer J. 464**

3. —— *Codicil—Legacy on secret Trust—Detailed verbal Instructions by Testator to One of several Trustees—Names of Beneficiaries—Written Memorandum on same Date as Execution of Codicil—Knowledge and Acceptance of Trust by all Trustees—Admissibility of parol Evidence—Validity of Trust Legacy.*

In re Fleetwood (1880) 15 Ch. D. 594 and *In re Huxtable* [1902] 2 Ch. 793 applied. *In re* BLACKWELL. BLACKWELL *v.* BLACKWELL - - - **Eve J. and C. A. 614**

4. —— *Construction—Absolute Gift—Cutting down absolute Gift—Failure of Gift over—Original Gift valid.*

Lassence v. *Tierney* (1849) 1 Mac. & G. 551 and *Hancock* v. *Watson* [1902] A. C. 14 applied.

In re Payne [1927] 2 Ch. 1 distinguished. *In re* MARSHALL. GRAHAM *v.* MARSHALL **Eve J. 661**

5. —— —— *Bequest of "my present lease"—Expiration of Lease—New Lease taken after Execution of the Will—Subsequent Codicil confirming the Will—Wills Act,* 1837 (1 *Vict. c.* 26), *s.* 24.

In re REEVES. REEVES *v.* PAWSON **Russell J. 351**

—— —— Devise to trustees upon trust (after widow's death) to pay rents to such of two daughters as should be then living—Death of one daughter after widow's death—Interest of surviving daughter - **421**
See LAW OF PROPERTY **7.**

6. —— —— *Residuary Gift—Life Interest to Testator's Widow—Remainder to Children or their "personal representatives"—Whether Executors or Next of Kin.*

In re Crawford's Trusts (1854) 2 Drew. 230 followed.

Bridge v. *Abbot* (1791) 3 Bro. C. C. 224; *Cotton* v. *Cotton* (1839) 2 Beav. 67 overruled. *In re* BROOKS. PUBLIC TRUSTEE *v.* WHITE **C. A. 214**

—— Direction to purchase house as residence for widow—Whether held on trust for sale—Contrary intention - **96**
See LAW OF PROPERTY **9.**

—— Execution of power of appointment—Gift to object upon protective trusts—Validity—Excessive exercise—Delegation - - - **703**
See POWER OF APPOINTMENT.

WILL—*continued.*

—— Foreign testator—English assets—Appointment of "heirs"—Duty of "heirs" similar to that of an English executor—Grant of administration to attorney of heirs—Foreign debts—Position of administrator - - - - **433**
See ADMINISTRATION **1.**

7. —— *Gift of "all my rights in connection with the play 'D'"—No "contrary intention"—Contract for sale of film Rights—Completion after Death of Testator—Right of Legatee to the purchase Price—Wills Act,* 1837 (1 *Vict. c.* 26), *s.* 24.

In re BANCROFT. BANCROFT *v.* BANCROFT **Russell J. 577**

8. —— *Gift of Legacies out of personalty Fund—Fund subject to Mortgages—Direction for Payment of Debts out of Proceeds of freehold and leasehold Property and Chattels—Expression of "contrary or other intention"—Special Fund for Payment of Debts insufficient—Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 35.

In re Birch [1909] 1 Ch. 787 applied. *In re* FEGAN. FEGAN *v.* FEGAN **Tomlin J. 45**

9. —— *Specific Devise—"All my Farms in B Parish"—Subsequent purchase of new Farm in B Parish—Codicil devising new Farm to other Persons—Partial Failure of codicillary Dispositions—Devolution of new Farm—Will speaking from Death—Contrary Intention—Wills Act,* 1837 (1 *Vict. c.* 26), *s.* 24.

Springett v. *Jenings* (1871) L. R. 6 Ch. 333 distinguished.

Ward v. *Van der Loeff* [1924] A. C. 653, 665, 671 and *Doe* v. *Marchant* (1843) 6 Man. & G. 813, 826 applied. *In re* DAVIES. THOMAS *v.* THOMAS-DAVIES - **Astbury J. 24**

10. —— —— —— —— —— *Conversion—Contract for Sale of Part of Land devised before Will made—Completion of Purchase after Testator's Death—Title to Proceeds of Sale—Whether passing under specific Devise or residuary Gift.*

Weeding v. *Weeding* (1861) 1 J. & H. 424 and *Drant* v. *Vause* (1842) 1 Y. & C. Ch. 580 followed and applied. *In re* CALOW. CALOW *v.* CALOW - - - - - **Eve J. 710**

—— Trustees to divide income among class for period—Subsequent trust for sale—Undivided shares—Costs of repairs—Capital or income - **721**
See LAW OF PROPERTY **8.**

11. —— *Uncertainty—Perpetuity—Property tied up during numerous Lives and twenty Years after—Queen Victoria's Descendants living on September* 6, 1926—*Common Form—Future Difficulty and Expense of ascertaining Date of Survivor's Death—Practicability—Validity.*

Thellusson v. *Woodford* (1805) 11 Ves. 112 explained and applied. *In re* VILLAR. PUBLIC TRUSTEE *v.* VILLAR - **Astbury J. 471**

WILL—*continued.*

—— Undivided shares—"Land held under one and the same settlement"—Vesting in trustees—"Trustees (if any) of the settlement" means trustees of settlement under the old law - - - - 429
See SETTLED LAND 4.

WINDING UP—Personal injury by negligence of company's servant—Judgment for damages and costs against company—Payment by insurance company to liquidator — Right of person injured—Proof - - 105
See COMPANY 6.

—— Proof of debt — Agreement between two insurance companies to participate in profits and losses — Absence of stamped policies—Proof rejected - - - - 74
See INSURANCE 3.

—— Surplus assets — Preference shares — Right to participate—Memorandum and articles of association — Construction - - - - 144
See COMPANY 8.

WORDS:—

—— "All my rights in connection with the play": *In re* BANCROFT Russell J. 577

—— "Fine": GARDNER & Co., LD. *v.* CONE - - - Maugham J. 955

—— "Immediate binding trust for sale": *In re* PARKER'S SETTLED ESTATES Romer J. 247

—— "Investigating title": *In re* COWARD, CHANCE & Co. - Russell J. 379

—— "My present lease": *In re* REEVES Russell J. 351

—— "Not being settled land": *In re* GAUL AND HOULSTON'S CONTRACT Clauson J. and C. A. 689

WORDS—*continued.*

—— "Open space of land": *In re* BRADFORD CITY PREMISES Tomlin J. 138

—— "Personal representatives": *In re* BROOKS - - - C. A. 214

—— "Persons interested": *In re* HAYWARD Clauson J. 367

—— "Sea Insurance": *In re* NATIONAL BENEFIT ASSURANCE CO., LD. Eve J. and C. A. 74

—— "Street": DAVIES *v.* RIPON CORPORATION - - - Tomlin J. 884

—— "Suffer an injustice": *In re* GREENE C. A. 528

—— "Sufficient cause": *In re* A DEBTOR Astbury and Tomlin JJ. 665

—— "Third parties": ROYAL LONDON MUTUAL INSURANCE SOCIETY, LD. *v.* BARRETT - - Tomlin J. 411

—— "Trustees (if any) of the settlement": *In re* CATCHPOOL - Russell J. 429

WORKMEN'S COMPENSATION—*Accident arising out of Employment — Incapacity—Voluntary Payments of Compensation—Application by Employers for Review and Termination—Cesser of voluntary Payments—Payment into Court—Alleged Liability to continue weekly Payments until Award that Incapacity had ceased—Action for Breach of statutory Duty — Damages — Workmen's Compensation Act*, 1925 (15 & 16 *Geo.* 5, *c.* 84), *ss.* 12, 21—*Workmen's Compensation Rules*, 1926, *rr.* 19, 59.

Ocean Coal Co. v. *Davies* [1927] A. C. 271 and *Niddrie and Benhar Coal Co.* v. *Dee* [1927] A. C. 299 applied.

Dicta of Lord Wrenbury and Lord Carson in *Ocean Coal Co.* v. *Davies* [1927] A. C. 271, 292, 297 discussed and explained.

Decision of Clauson J. affirmed.

CATTON *v.* ASHWELL AND NESBIT, LD. Clauson J. and C. A. 484

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(p. 57 to p. 104).

PART II.—FEBRUARY 1.

TABLE OF CASES.

CHANCERY DIVISION.

	PAGE		PAGE
HANSON, *In re.* HANSON *v.* EASTWOOD	96	NATIONAL BENEFIT ASSURANCE CO., *In re. Ex parte* ENGLISH INSURANCE CO. .. .. .. C. A.	74
MABER, *In re.* WARD *v.* MABER ..	88		
MYHILL, *In re.* HULL *v.* MYHILL ..	100	TREDEGAR (LORD) *v.* HARWOOD C. A.	59

FOR MODE OF CITATION, SEE BEGINNING OF INDEX.
[*For Names of Editors and Reporters see Inside.*]

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1,
AND
PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4.

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17 JUL 1967